Supreme Court, U.S.
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In The
Supreme Court of the United States

ALEKSANDER STOLAJ;
DIELLA STOLAJ,
Petitioners

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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February, 2010

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the five-year limitations period of 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the five-year period has passed based on the noncitizen's ineligibility for permanent resident status at the time it was granted, where the final removal order rescinds the noncitizen's permanent resident status. This question has divided the circuits with the Third Circuit Court of Appeals concluding that the government is barred from initiating removal proceedings on this basis. In the decision below, the Sixth Circuit Court of Appeals joined the Fourth, Eighth, and Ninth Circuits in reaching the opposite conclusion.

2. The primary evidence against the Petitioners consisted of out-of-court testimonial statements. The party offering this testimony made no effort to secure the witness's presence and the Immigration Court denied the Petitioners' application for a subpoena. Were the Petitioners deprived of their due process right to a full and fair hearing where the government's evidence was actually consistent with their claim that they were unaware of a scheme to fraudulently obtain asylum?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Aleksander Stolaj and Diella Stolaj respectfully petition that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on August 19, 2009.

There is a split among the circuits as to whether 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the expiration of that statute's five-year limitations period when the basis for the removal proceeding is the noncitizen's ineligibility for permanent resident status at the time of adjustment of status, where the final removal order rescinds the noncitizen's permanent resident status. The decision below, concluding that the statute does permit the initiation of removal proceedings beyond the five-year period, is contrary to the statute's plain language and is premised on an unreasonable interpretation of the statute. The position put forth by the Petitioners was adopted by the Fourth Circuit in Garcia v. Attorney General of U.S., 553 F.3d 724 (3rd Cir. 2009). The Sixth Circuit has joined the Fourth, Eighth, and Ninth Circuits in reaching

the opposition conclusion. See Kim v. Holder, 560 F.3d 833 (8th Cir. 2009); Asika v. Ashcroft, 362 F.3d 264 (4th Cir. 2004); Biggs v. INS, 55 F.3d 1398 (9th Cir. 1995).

The substance of the government's claim that Petitioners obtained lawful permanent resident status by fraud or misrepresentation was that they were willing participants in an asylum fraud scheme that involved a notario and an INS Asylum Office supervisor. To meet this burden, the government relied on the out-of-court testimonial statements made by a witness at the INS officer's criminal trial. The Petitioners or someone whose interests aligned with theirs did not have an opportunity to cross examine the notario. The government did not call him or the former INS supervisor as a witness in Petitioners' removal proceedings nor did it allege that the witnesses were unavailable. The Immigration Judge ("IJ") denied Petitioners' application to subpoena these witnesses.

The relied-upon hearsay testimony actually exonerated Petitioners because the declarants suggested that the Petitioners were unaware of

any fraudulent conduct, they only paid what was a reasonable fee for assistance in the asylum process, and the illegal activity occurred only after Petitioners received asylum.

Petitioners have a due process right to a full and fair hearing. Under the facts of this case, that right included a right to cross-examine the witnesses against them, or at minimum an effort by the government to produce those witnesses.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, App., *infra*, B1, is reported at 577 F.3d 61 (6th Cir. 2009). The opinion of the Board of Immigration Appeals, App., *infra*, C1, is unreported. The IJ's decision, App., *infra*, D1, is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, App., *infra*, A1, was entered on November 25, 2009. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

At all times relevant to this case, 8 U.S.C. § 1256(a) provided in relevant part:

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

STATEMENT

(i) Nature of the Case

This case presents two important and recurring questions. The first is whether the section 1256(a)'s statute of limitations for the initiation of rescission proceedings applies to the initiation of removal proceedings where the proceedings are based on the noncitizen's ineligibility for permanent resident status at the time of adjustment of status and the final removal order rescinds the noncitizen's permanent resident status. There is a circuit split on this question.

The second question is whether it is a violation of noncitizens' due process rights in removal proceedings to allow the government to rely on hearsay evidence without making an effort to call the declarant as a witness or allow the noncitizen to subpoena the declarants, especially where the hearsay evidence is ambiguous, is the primary evidence of removability, and there was no meaningful opportunity to cross-examine the witness in a prior proceeding.

(ii) Factual Background

Diella Stolaj and her husband, Aleksander Stolaj, are citizens of Albania. They were lawfully admitted to the U.S. as nonimmigrants on February 26, 1996. On December 18, 1996, they each filed timely, separate applications for asylum with the former Immigration and Naturalization Service ("INS"). Mr. Stolaj subsequently withdrew his application and proceeded as a derivative beneficiary of Ms. Stolaj's application.

On February 6, 1997, the INS approved Mrs. Stolaj's asylum application and they each received asylee status. The INS later adjusted their statuses to that of lawful permanent residents, retroactive to October 1, 1997.

(iii) Agency Proceedings

On July 9, 2003, Immigration and Customs Enforcement ("ICE")[1] initiated removal proceedings against the Stolajs. ICE alleged that they were inadmissible at the time of their adjustment of status because they obtained

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[1]ICE is a successor agency to the INS.

asylum through fraud or misrepresentations. 8 U.S.C. § 1227(a)(1)(A); 8 U.S.C. §§ 1182(a)(6)(C)(i), (a)(7)(A)(i)(I).

On December 13, 2006, an IJ in Detroit, Michigan, sustained the removal charges. App. A1. The IJ credited the out-of-court statements of a witness who conspired with an INS Asylum Office supervisor to fraudulently obtain asylum for several applicants.

The Stolajs timely appealed to the BIA. On June 26, 2008, the BIA denied their appeal. The BIA found that they were subject to removal and that ICE met its burden of proof. App. B1.

(iv) Petition for Review

The Stolajs timely petitioned for review to the Sixth Circuit. The court denied his petition for review in a published decision on August 19, 2009. 577 F.3d 651, App. B1. The Court held that ICE was not time-barred from initiating the removal, ICE met its burden of proof, and Petitioners received a full and fair hearing.

The court denied their petition for panel and en banc rehearing. App. A1.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve a split among the circuits. The circuit split concerns whether 8 U.S.C. § 1256(a) permits the government to initiate removal proceedings after the expiration of the five-year period based on the noncitizen's ineligibility for permanent resident status at the time of adjustment of status, where the final removal order rescinds the noncitizen's permanent resident status. The decision below, concluding that the statute does permit the initiation of removal proceedings beyond the five-year period, is contrary to the statute's plain language and is premised on an unreasonable interpretation of the statute.

Petitioners had a due process right to a full and fair hearing. Under the facts of this case, that right included a right to cross-examine the witnesses against them, or at least an effort by the government to produce those witnesses.

ICE's primary evidence was the transcribed testimony of a witness at the criminal trial of a corrupt INS supervisor. The Petitioners did not have any opportunity to cross examine the witness. ICE did not call the witness or the former INS supervisor as a witness in Petitioners' removal proceedings nor did it allege that the witnesses were unavailable.

The IJ did not let Petitioners' subpoena these witnesses to clarify the ambiguities in the statements. The relied-upon hearsay testimony actually exonerated Petitioners because the declarants suggested that the Petitioners were unaware of any fraudulent conduct, they only paid what was a reasonable fee for assistance in the asylum process, and any illegal activity occurred only after Petitioners were granted asylum.

I. Section 1256(a) Provides A Five-Year Statute Of Limitations On Initiating Removal Proceedings Against A Noncitizen Who Was Ineligible For Permanent Resident Status At The Time It Was Granted.

The Sixth Circuit's decision below is in conflict with the Third Circuit's decision in Garcia, 553 F.3d at 726-28. See Stolaj, 577 F.3d at 655-57; see also

Kim, 560 F.3d 833 (8th Cir.); Asika, 362 F.3d 264 (4th Cir.); Biggs, 55 F.3d 1398 (9th Cir.).

The Third Circuit's decision represents the better reading of 8 U.S.C. § 1256(a). The plain language of that statute imposes a five-year statute of limitations on the initiation of removal proceedings against a noncitizen where the proceeding is based on an allegation that the noncitizen was ineligible for permanent resident status at the time he or she received adjustment of status. Garcia, 553 F.3d at 727-28.

A. The plain language of section 1256(a) provides a five-year statute of limitations period

The Sixth Circuit misconstrued the plain language of 8 U.S.C. § 1256(a). Stolaj, 577 F.3d at 656. There is no dispute that rescission proceedings against a permanent resident who is accused of being ineligible for adjustment of status must be initiated within five years of the grant of adjustment of status.

Rescission proceedings are unwieldy and rarely instituted. Over the last five years, rescission

proceedings were approximately 1/100 of one percent of all Immigration Court proceedings. http://www.justice.gov/eoir/statspub/fy08syb.pdf at page 16 (last visited February 15, 2010). If the government successfully pursues rescission proceedings against a permanent resident, the noncitizen loses that status but the government must then go through another set of proceedings to establish the noncitizen's removability.

To avoid the need for multiple proceedings, Congress amended section 1256(a) to permit ICE to combine the two proceedings into a single removal proceeding.[2] In that proceeding, ICE can allege, as it did against the Stolajs, that a noncitizen is removable because he or she was inadmissible at the time of adjustment of status. 8 U.S.C. § 1227(a)(1)(A). The order of removal "shall be sufficient to rescind the alien's status." 8 U.S.C. § 1256(a).

As the Third Circuit noted, the amendment to section 1256(a) has two clear provisions. The first is

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[2]Illegal Immigration and Immigrant Responsibility Act of 1996, § 378(a), Pub. L. No. 104-208.

that the government may remove a noncitizen without first taking steps to rescind an adjustment of status. The second is that the removal order is sufficient to rescind the noncitizen's status. See Garcia, 553 F.3d at728.

When Congress amended section 1256(a) by adding the last sentence, it provided ICE with an easier and more efficient way to remove certain lawful permanent residents. It did not provide ICE with a way to avoid the five-year statute of limitations. This is clear from the provision stating that a removal order will rescind the noncitizen's permanent resident status. 8 U.S.C. § 1256(a).

B. The BIA's interpretation of the statute is unreasonable

Even if the language of 8 U.S.C. § 1256(a) is not plain, the BIA's interpretation is unreasonable. The Third Circuit correctly declined to defer to the BIA's interpretation because the statute is a statute of limitations, which is not within the BIA's area of expertise. Garcia, 553 F.3d at 727; see also Iavorski v. INS, 232 F.3d 124, 133 (2nd Cir. 2000); Coghlan v. NTSB, 470 F.3d 1300, 1304 (11th Cir. 2006).

The BIA's interpretation is unreasonable. By permitting ICE to initiate removal proceedings at any time based on a claimed ineligibility for adjustment of status, it would disrupt the long-settled expectations of permanent residents and their families. As time marches on, it becomes increasingly difficult for a permanent resident to marshal the evidence and witnesses necessary to rebut an allegation of fraud or ineligibility in the adjustment of status process. If the defect in the adjustment of status proceeding was one that could have been corrected or waived, the more time that passes the more likely it is that the permanent resident would be unable to do so because of a change in family or employment status.

Take, for example, a noncitizen who adjusted her status based on her marriage to a U.S. citizen. Years later, ICE could conclude that she was ineligible for adjustment of status because she was convicted of a crime that rendered her inadmissible, even though the adjudicating officer at the time knew about the conviction and believed that the conviction did not trigger a ground of inadmissibility. Had the adjudicating

officer concluded that the noncitizen was inadmissible, she could have applied for a waiver under 8 U.S.C. § 1182(h). Without a statute of limitations, ICE could years later seek to remove the noncitizen because of this change in interpretation and the noncitizen may no longer have a qualifying relative for the waiver or for the adjustment of status application itself.

Or, for example, once a noncitizen gains permanent resident status, he can petition for other family members to join him in the U.S. If ICE succeeds in removing the noncitizen because it later determined there was a defect in the adjustment of status process, it would throw into doubt the validity of the immigration statuses of his family members.

The five year statute of limitations period serves an important purpose. It gives some assurance to permanent residents, their families, and their employers that mistakes in the adjustment of status process, whether inadvertent or otherwise and whether made by the government or the noncitizen, will not forever cast doubt on their

status here. There has to be some finality to the process.

Rescission is a "harsh" penalty. Quintana v. Holland, 255 F.3d 161, 164 (3rd Cir. 1958). The government has the entire adjudications process and an additional five years to make sure it reaches the correct result. The government performs a lengthy background check before adjudicating any application for a benefit and it has plenty of time to catch any potential ineligibilities. See, e.g., Kashkool v. Chertoff, 553 F. Supp. 2d 1131 (D. Ariz. 2008) (six year adjudication delay); Aslam v. Mukasey, 531 F. Supp. 2d 736, 743 (E.D. Va. 2008) (three year delay).

That ICE finds it difficult to remove a lawful permanent resident is no reason for the government to renounce the restrictions imposed by Congress. See Gertsenshteyn v. U.S. Dept. of Justice, 544 F.3d 137, 148 (2nd Cir. 2008). The rule of lenity applies to this case and any ambiguities should be resolved in favor of the noncitizens. See Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004).

Over fifty years ago, the Court articulated the principle of narrow construction as an overall guide to statutory interpretation of the immigration laws, stating that,

> 'We resolve the doubts in favor of that [narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile.' It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 68 S. Ct. 374, 376 (1948).

II. Due Process Required The Immigration Court To Provide Petitioners With An Opportunity To Cross-Examine The Witness Against Them Given The Ambiguity In The Hearsay Statements

ICE bore the burden of establishing by clear and convincing evidence that the Stolajs gained lawful permanent resident status through fraud or misrepresentation by bribing John Shandorf, an Asylum Office supervisor. 8 U.S.C. § 1229a(c)(3)(A); Stolaj, 577 F.3d at 657. The only evidence offered by ICE to meet their burden of proof was the transcribed testimony of Luigji Berishaj from the criminal case against Mr. Shandorf. The IJ credited the hearsay testimony over the Stolajs' testimony. However, a careful reading of Mr. Berishaj's testimony shows that it is completely consistent with the Stolajs' testimony.

The party offering the hearsay, ICE, did not attempt to call Mr. Berishaj as a witness nor did it seek to establish his unavailability for trial. The Stolajs applied for a subpoena to compel his testimony but the IJ denied their request. Given the ambiguities in Mr. Berishaj's hearsay statements, due process required an opportunity to

cross-examine Mr. Berishaj or at least a demonstration of his unavailability.

A. Petitioners had a right to cross-examine the witness against them

Noncitizens in removal proceedings have a right to cross-examine witnesses presented by the government. 8 C.F.R. § 1240.10(a)(4). The right to confront and cross-examine witnesses is an important aspect of any fact-based inquiry. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." Goldberg v. Kelly, 397 U.S. 254, 269 (1970); see also See Olabanji v. INS, 973 F.2d 1232 (5th Cir. 1992) (reversing deportation order where adverse lay and expert witnesses where unavailable for cross-examination); Hernandez-Garza v. INS, 882 F.2d 945 (5th Cir. 1989) (error to admit witness affidavit where INS failed to conclusively demonstrate it sought witnesses' presence at hearing). While the rules of evidence do not strictly apply in removal proceedings, noncitizens are guaranteed a full and fair hearing. Matter of Wadud, 19 I&N Dec. 182 (BIA 1984);

Hassan v. Gonzales, 403 F.3d 429, 435 (6th Cir. 2005).

ICE offered the transcript of Mr. Berishaj's testimony at Mr. Shandorf's criminal trial as the sole evidence of the Stolajs' removability, but it never even attempted to show that it sought Mr. Berishaj or Mr. Shandorf's presence at the hearing. This out-of-court statement is testimonial and it is inadmissible hearsay. Crawford v. Washington, 541 U.S. 36, 51-52 (2004). ICE may not use an affidavit from an absent witness unless it first establishes that, despite reasonable efforts, it was unable to secure the presence of a witness. Ocasio v. Ashcroft, 375 F.3d 105, 107 (1st Cir. 2004); see also Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674, 681-82 (9th Cir. 2005).

The Stolajs attempted to remedy ICE's failure to try to secure the presence of the witnesses by applying for subpoenas. 8 C.F.R. § 1003.35(b)(2). Even though ICE was the party offering the hearsay evidence, the IJ placed the burden on the Stolajs to prove that Mr. Berishaj and Mr. Shandorf would only testify if subpoenaed. The IJ flipped the burden of proof because as the party offering the out-of-court statement, ICE bore the burden of

producing the witnesses or establishing their unavailability. These witnesses could have even testified telephonically or via televideo from a court or government office near their residence. 8 C.F.R. § 1003.35(b)(4).

B. Denial of the right to confront the hearsay declarant prejudiced Petitioners

The primary evidence against the Stolajs was Mr. Berishaj's testimony at Mr. Shandorf's criminal trial. It was the only evidence, outside of perceived inconsistencies in the Stolajs' testimony, that ICE offered to prove that the Stolajs obtained asylum through fraud.

However, the evidence does not even establish this and it was, at best, ambiguous. The Stolajs testified that Mr. Berishaj helped them fill out and file their asylum applications. They testified that when they completed and mailed the applications, they did not pay Mr. Berishaj.

The IJ completely credited the testimony that Mr. Berishaj gave in the other proceeding. Mr. Berishaj testimony was essentially consistent with

the Stolajs' testimony, a point overlooked by the IJ and BIA. Mr. Berishaj frequently translated for applicants at their asylum interviews, so he was friendly with many of the officers at the Asylum Office. Mr. Berishaj testified that he developed a friendship with Mr. Shandorf and that Mr. Shandorf helped him navigate the asylum process for his clients. Early in their relationship, Mr. Berishaj did not pay Mr. Shandorf for his assistance, other than to buy him dinner or drinks.

At some point, Mr. Berishaj began doing more than translating. He began assisting applicants through the entire asylum process even though he was not an attorney. The Stolajs were the third clients that Mr. Berishaj helped apply for asylum. Mr. Berishaj called Mr. Shandorf and met him in person to ask him to help the Stolajs through the asylum process. Mr. Berishaj did not pay Mr. Shandorf for his help. Initially, there was no expectation of payment.

It was only *after* the Stolajs received asylum that what began as friendly assistance turned into something criminal. Mr. Berishaj treated Mr. Shandorf to drinks at a local restaurant to thank

him for his help, "if he had anything to do with the grant" of asylum to the Stolajs. Mr. Berishaj was not even sure if Mr. Shandorf was responsible for the asylum grant.

After Mr. Berishaj paid for drinks, Mr. Shandorf said "I deserve more." Mr. Shandorf demanded payment of at least $1,000. It was only then that Mr. Berishaj contacted Mr. Stolaj and asked for payment. Mr. Berishaj testified that he did not tell Mr. Stolaj that the payment was to go to an INS officer. Rather, he told Mr. Stolaj that "[he] had somebody helping [Mr. Stolaj] get the asylum, so we need to give him some money." Mr. Stolaj paid him $2,000, which according to Mr. Berishaj was less than what a lawyer would have charged.

Thus, contrary to the IJ's conclusion, the Stolajs were unknowing and unwilling participants in a bribery scheme. Rather, at worst, they were victims of an extortion attempt by an INS supervisor with the power to revoke what they thought were they lawful grants of asylum.

Even though Mr. Berishaj's out-of-court statements seemed to favor the Stolajs, the IJ

found that it established that the Stolajs obtained asylum through fraud because they bribed an INS officer. Mr. Berishaj's statements do not support this conclusion. Because he was not available to testify, ICE and the Stolajs did not have an opportunity to explore this ambiguity.

The Stolajs never had the opportunity to cross-examine Mr. Berishaj. At Mr. Shandorf's criminal trial, Mr. Shandorf did not have an incentive to Mr. Berishaj about the extent of the Stolajs' involvement and the exact timing, because Mr. Berishaj's testimony that Mr. Shandorf later demanded payment for this and other cases was sufficient to establish his guilt.

The failure to subpoena Mr. Berishaj and Mr. Shandorf prejudiced the Stolajs. It resulted in the rescission of their permanent resident status and their removal. There was no opportunity for clarification of the ambiguities in Mr. Berishaj's testimony or for those witnesses to explain that the Stolajs were unwitting victims of an extortion scheme. The Stolajs did not receive the full and fair hearing that they were entitled to.

CONCLUSION

Petitioners respectfully submit that the Sixth Circuit erred in the following respects:

There is a five-year statute of limitations for initiating removal proceedings based on a noncitizen's ineligibility for permanent resident status at the time that adjustment of status is granted.

Petitioners did not receive a full and fair hearing because the Immigration Judge relied on an ambiguous out-of-court testimonial statement from the government's witness, the government made no effort to secure the witness's presence at the hearing, and the Immigration Judge denied Petitioners' request to subpoena the witness.

Therefore, Petitioners respectfully pray that the Court grant their petition for writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully Submitted,
/s/ Marshal E. Hyman
Marshal E. Hyman
Counsel of Record
/s/ Russell Reid Abrutyn
Russell Reid Abrutyn

APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying Petition for Rehearing,
filed 11/25/09 ..... A1 - A2

Opinion,
filed 08/19/09 ..... B1 - B30

AGENCY FILINGS:

Decision of the Board of Immigration,
filed 06/26/08 ..... C1 - C8

Decision and Order
of the Immigration Judge,
filed 12/13/06 ..... D1 - D40

No. 08-3858

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEKSANDER STOLAJ, ET AL.,
Petitioners,

v.

ORDER

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

BEFORE: MOORE and ROGERS, Circuit Judge; and THAPAR,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised

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*Hon. Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green
Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0296p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEKSANDER STOLAJ; DIELLA STOLAJ,
Petitioners,

No. 08-3858

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Petition for Review of an Order of the Board
of Immigration Appeals.
Nos. A73 624 851; A73 624 852.

Argued: August 4, 2009

Decided and Filed: August 19,2009

Before: MOORE and ROGERS, Circuit Judges;
THAPAR, District Judge.*

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*The Honorable Amul R. Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

COUNSEL

ARGUED: Andrea J. Ferrara, LAW OFFICES OF ANDREA J. FERRARA, Eastpointe, Michigan, for Petitioners. James E. Grimes, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Andrea J. Ferrara, LAW OFFICES OF ANDREA J. FERRARA, Eastpointe, Michigan, for Petitioners. James E. Grimes, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

ROGERS, J., delivered the opinion of the court, in which THAPAR, D. J., joined. MOORE, J. (pp. 14-15), delivered a separate opinion concurring in part and concurring in the judgment.

OPINION

ROGERS, Circuit Judge. Aleksander and Diella Stolaj, citizens of Albania, petition for review of the decision of the Board of Immigration Appeals that affirmed the Immigration Judge's removal order. The IJ found the Stolajs removable due to fraud in their asylum applications and because they had no valid entry documents at the time of their adjustment of status. Contrary to the

Stolajs' arguments, the five-year statute of limitations on rescission proceedings did not bar the Government from initiating removal proceedings based on the Stolajs' fraud. In addition, the IJ did not err in allowing the Government to initiate removal proceedings without first seeking to revoke the Stolajs' asylee status, and the IJ properly denied the Stolajs' motion to subpoena material witnesses. Because the decisions of the IJ and the BIA are supported by substantial evidence and are not manifestly contrary to the law, they must be upheld.

I.

Aleksander and Diella Stolaj, husband and wife, are citizens of Albania who entered the United States on February 26, 1996. On December 18, 1996, they each filed applications for asylum, but on January 23, 1997, Aleksander Stolaj withdrew his application and requested that he be included on his wife's application.

Asylum Officer Mark Bastian of the New York Asylum Office interviewed Diella Stolaj on the same day that Aleksander withdrew his application, and

filed an assessment memo on the following day. Officer Bastian found that Diella Stolaj "has not shown any past persecution" and that her "fear of future persecution in Albania is not sustained by the Acosta 4 prong test for well foundedness." Despite this assessment, Diella Stolaj was granted asylum on February 6, 1997, because she had "established a well-founded fear of persecution upon return to [Albania]." Aleksander Stolaj was granted derivative asylum the same day. The Stolajs adjusted to lawful permanent resident status on October 1, 1998.

The FBI began investigating allegations that Asylum Officer John Shandorf, Bastian's supervisor, had accepted bribes in exchange for granting asylum applications. On November 17, 1998, the FBI arrested Luigi Berishaj based on information that Berishaj was collecting money from Albanian friends and paying Shandorf to secure political asylum for them. The FBI report[1] states that:

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[1]This FBI report is part of the administrative record but was not admitted into evidence by the IJ and therefore cannot support the IJ' s decision. Much of the same information is contained in Berishaj's

> From in or about mid-1996 until September, 1997 BERISHAJ made cash payments to SHANDORF in connection with approximately twenty cases. Each time BERISHAJ paid SHANDORF between $1,500 and $2,000. In exchange for these payments SHANDORF agreed to provide assistance in securing political asylum for these individuals. In all but three or four of the twenty cases mentioned above the applicants were granted political asylum.

Berishaj indicated that Diella Stolaj was one of the individuals who paid him to obtain political asylum through Shandorf.

Shandorf was indicted for his involvement in this bribery scheme. During Shandorf's trial, Berishaj testified about his involvement in the scheme and his interactions with the Stolajs. Berishaj testified that Aleksander Stolaj approached him for help in

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testimony from Shandorfs trial and Shandorfs indictment, which were admitted into evidence. The information from the FBI report is used only for background purposes.

obtaining asylum, and Berishaj subsequently spoke with Shandorf about the Stolajs. When Berishaj told Shandorf that the Stolajs lived in Detroit, Shandorf advised Berishaj that the couple should use a Westchester, New York, address on their application. (Shandorf worked out of the New York Asylum Office.) Berishaj filled out the asylum applications for the Stolajs and submitted the forms to the Vermont Service Center. Berishaj accompanied the Stolajs to their interview at the New York Asylum Office. Shandorf told Berishaj to wait with the Stolajs in the cafeteria until Shandorf called the Stolajs into the office. Berishaj testified that Shandorf was in the interview, but could not recall if there was another officer present.

On July 9, 2003, the Department of Homeland Security initiated removal proceedings by issuing Notices to Appear to the Stolajs. The Notices to Appear stated that the Stolajs were subject to removal based on the following allegations:

> 8. You procured your admission, visa, other documentation or benefit by fraud or by willfully misrepresenting

> a material fact, to wit: You obtained the immigration benefit of asylee status by fraud; a supervisor convicted of granting asylum in exchange for bribes changed your denial to a grant for the sum of $3,000.
>
> 9. At the time of your adjustment to permanent resident status you did not then possess or present a valid immigrant visa, reentry permit, order crossing identification card, or other valid entry document, and you were not exempt therefrom.

The Stolajs filed several motions prior to their individual hearings, including a motion to terminate and a motion to subpoena material witnesses.

The IJ conducted a merits hearing on July 7, 2005, at which Aleksander and Diella Stolaj testified. The Stolajs testified that they lived with Diella Stolaj's family in Detroit when they first entered the United States in February 1996. The Stolajs testified that they moved to New York in April 1996 and lived there until April 1997 when they returned to Michigan. A few months prior to filing their asylum application in December 1996, the

Stolaj s testified that they ran into Berishaj in a restaurant in Michigan.[2] The IJ summarized Aleksander Stolaj's testimony regarding the Stolajs' interactions with Berishaj:

> Male respondent testified that he applied for asylum in December 1996 or January 1997. His wife's sister told him about the availability of political asylum. About a month and a half before submitting the application, he went with his wife and her sister to pick up the application at a travel agency in Hamtramck [Michigan]. After picking up the application, they went to a restaurant to get some food and to wait for female respondent's uncle to come assist them in filling out the forms. Luigji Berishaj came into the restaurant and recognized female respondent from Yugoslavia. They

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[2]The Government attorney questioned Aleksander Stolaj about this encounter with Berishaj in Michigan, which took place during the time Stolaj testified he was living in New York. Though the time line and location of these events is unclear from his testimony, Stolaj testified that he traveled back to Michigan because his wife's sister told him about how to pick up asylum forms in the area.

> talked, and Berishaj offered to help fill out the asylum applications. Berishaj said nothing about having filled out other asylum applications. Berishaj would ask each question, respondents would reply, and Berishaj would write the statement in English. After completing the form, Berishaj read it back to them. Berishaj offered to mail the applications with an envelope obtained at the travel agency. Male respondent denied giving Berishaj any money in exchange for his help and also stated that no one else gave Berishaj any money on his behalf.

On December 13, 2006, the IJ found that the Stolajs were removable because "[t]he Government has proven through clear and convincing evidence that the respondents were granted asylum through fraud." The IJ summarized the reasons supporting this conclusion:

> The Government has provided a transcript of a criminal proceeding containing the sworn testimony of the individual who respondents admit completed their applications for them stating that respondents received their asylum due to the improper

> interference of an asylum supervisor, John Shandorf, who was paid for his help. The Government presented the incredible testimony of the respondents on the circumstances concerning their encounter with Berishaj. Finally, the Government showed that the claimed New York residence was a misrepresentation provided to ensure that the respondents would be able to benefit from Berishaj's relationship with John Shandorf.

The IJ also found that the Stolajs were removable "because there was no valid basis for their adjustment of status. As the Government has shown that the asylum and following adjustment were obtained by fraud, and as respondents admitted originally overstaying their visas, the Government has proven the respondents have no valid documents."

On January 12, 2007, the Stolajs appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). The Stolajs argued that: (1) the Government's removal action was barred by the five-year statute of limitations on rescission

proceedings in 8 U.S.C. § 1256(a); (2) the IJ improperly allowed the Government to initiate removal proceedings without first revoking the Stolajs' asylee status; (3) the record did not support a finding that the Stolajs engaged in fraud in their asylum application; (4) the IJ applied the wrong standard in revoking the Stolajs' permanent resident status; (5) the IJ abused his discretion in denying the Stolaj s' motion to subpoena material witnesses; and (6) the IJ erred in finding the Stolajs not credible.

On June 26, 2008, the BIA adopted and affirmed the IJ's decision and dismissed the Stolajs' appeal. The BIA found that the Stolajs' status as lawful permanent residents or asylees did not immunize them from removal proceedings, citing *Matter of Smriko*, 23 I. & N. Dec. 836 (BIA 2005). The BIA also found "no adequate basis to disturb the Immigration Judge's finding that the respondents obtained their asylee status through fraud, based on the properly admitted transcript of the testimony of Luigi Berishaj . . . ." "Thus, the DHS satisfied its burden of proving by clear and convincing evidence that the respondents were removable." Finally, the BIA found that the IJ

properly denied the Stolajs' motion to subpoena material witnesses and that there was no evidence that the IJ "discarded his role as a neutral arbiter."

The Stolajs filed a timely petition for review in this court on July 10, 2008. On appeal, the Stolajs raise the same arguments they raised before the BIA.

II.

The Government was not time-barred from initiating removal proceedings against the Stolajs. The five-year statute of limitations on rescission proceedings found in 8 U.S.C. § 1256(a) does not apply to the removal proceedings brought against the Stolajs.

At the time the Government initiated removal proceedings, the Stolajs had successfully adjusted their statuses to permanent lawful residents. The Stolajs argue that the Government was barred from "placing Petitioners in Rescission proceedings more than 5 years after their status was adjusted to that of permanent resident status." The Stolajs base this argument on the statute

defining the power of rescission of lawful permanent resident status:

> If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. § 1256(a). The Stolajs assert that the Government attempted to circumvent the statute of limitations on rescission proceedings by initiating removal proceedings instead. The Stolajs argue that, under these circumstances, § 1256(a)'s five-year statute of limitations also applies to removal proceedings.

The Stolaj s recognize that the Attorney General and several circuits have rejected the argument that the five-year statute of limitations on rescission proceedings in § 1256(a) applies to removal proceedings. *See Matter of Belenzo*, 17 I. & N. Dec. 374 (A.G. 1981); *Asika v. Ashcroft*, 362 F.3d 264 (4th Cir. 2004); *Kim v. Holder*, 560 F.3d 833, 836-38 (8th Cir. 2009); *Monet v. INS*, 791 F.2d 752, 754 (9th Cir. 1986); *Olofeo v. INS*, 643 F.2d 679, 681-83 (9th Cir. 1981). However, the Stolajs urge this panel to follow the contrary conclusion of the Third Circuit in *Bamidele v. INS*, 99 F.3d 557 (3d Cir. 1996) (later reaffirmed in *Garcia v. Attorney General*, 553 F.3d 724 (3d Cir. 2009)), and hold that § 1256(a)'s statute of limitations applies to removal proceedings. We decline to do so.

By its own terms, § 1256 places a time bar only on the Government's attempt to rescind the status of a lawful permanent resident, and does not apply to removal proceedings. In an attempt to clarify the separate nature of removal and rescission proceedings, Congress amended § 1256(a) in 1997 by adding the final sentence. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C., Title III, § 378(a), 110 Stat. 3009. This amendment explicitly allows the Government to initiate removal proceedings, such as those brought against the Stolajs, without first rescinding the alien's permanent resident status.

To the extent that there might be ambiguity in the application of § 1256(a)'s statute of limitations to removal proceedings based on charges that would also support rescission of status, we defer to the Attorney General's interpretation because it is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984); *see also Asika*, 362 F.3d at 269; *Kim*, 560 F.3d at 837-38. The Attorney General first resolved any ambiguities in § 1256(a) in a 1962 opinion: "I conclude that since [8

U.S.C. § 1256] only limits the Attorney General's authority to rescind an adjustment of status, the lapse of more than five years since applicant's adjustment does not bar an exclusion proceeding based upon the alleged fraudulent procurement of an entry visa prior to his adjustment of status." *Matter of S-*, 9 I. & N. Dec. 548, 557 (A.G. 1962).

In *Bamidele*, the Third Circuit rejected the Attorney General's construction because, the court reasoned, that construction would essentially read the statute of limitations on rescissions out of existence-that is, the Government could always do something through removal that it could not do otherwise through rescission. *See Bamidele*, 99 F.3d at 564. However, the Third Circuit did not sufficiently credit the important role played by the statute of limitations on rescissions even though it does not apply to removal proceedings. As the Fourth Circuit explained, the five-year statute of limitations on rescission of status has a meaningful role because the INA provides far fewer procedural protections for rescission proceedings than for removal proceedings:

> Under the Act, rescission proceedings are subject to few, if any, procedural protections, see 8 U.S.C. § 1256; deportation proceedings, in contrast, are subject to extensive procedural regulations set forth in 8 U.S.C. § 1229a. In light of this difference in the two procedures, section 246(a)'s five-year limitation on rescission-even if interpreted to apply only to rescission proceedings-provides an important safeguard to aliens like Asika, who have been in the country for more than five years after their status has been erroneously adjusted, by forcing the Attorney General to establish their deportability through the more rigorous procedures of removal, see 8 U.S.C. § 1229a, rather than the less procedurally-onerous process of rescission.

Asika, 362 F.3d at 269; *see also Belenzo*, 17 I. & N. Dec. at 382-83; *Matter of S-*, 9 I. & N. Dec. at 555 n.8. The Attorney General reasonably concluded that § 1256(a)'s statute of limitations only applies to rescission proceedings.

By its own terms, § 1256(a)'s statute of limitations only applies to rescission proceedings.

Even if the provision is ambiguous when charges supporting removal would also support rescission of status, the Attorney General's opinion that § 1256(a) does not apply to removal is reasonable and is entitled to deference. Therefore, the Government was not time-barred from bringing removal proceedings against the Stolajs.

III.

The Stolajs argue that the IJ and the BIA erred in allowing the Government to initiate removal proceedings without first following the requirements for revoking the Stolajs' asylee status. This argument is without merit. The BIA correctly found that the Stolajs are not immune from removal simply because their asylee status was never revoked.

The IJ determined that "as legal permanent residents, the asylum revocation procedures are irrelevant to the respondents." The BIA affirmed the IJ's decision on this point but clarified the supporting reasons. The BIA noted that in *Matter of Smriko*, 23 I. & N. Dec. 836 (BIA 2005), "we determined that a refugee who had adjusted his

status to lawful permanent resident and later was convicted of crimes was not immune from removal because his refugee status had not been terminated." In *Smriko*, the BIA did not focus on whether a refugee loses his status as a refugee when he becomes a legal permanent resident, as is implied by the IJ' s decision. Rather, the BIA held that refugee status does not confer immunity from removal, and therefore revocation of refugee status is not required before the initiation of removal proceedings. *Id.* at 838-40. "Although some vestiges of refugee status are afforded by regulation to refugees who have been admitted as lawful permanent residents, termination of refugee status is not a precondition to the initiation of removal proceedings against refugees who have adjusted their status." *Id.* at 837; *see also Kaganovich* v. *Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006); *Romanishyn v. Attorney General*, 455 F.3d 175, 183-84 (3d Cir. 2006).

IV.

The BIA correctly found that the Stolajs were removable because "they had obtained the immigration benefit of asylum by fraud," and

"since their asylee status was fraudulently procured, [they] were inadmissible as immigrants with no valid visa or entry document." *See* 8 U.S.C. § 1182(a)(6)(C)(i), (a)(7)(A)(i)(I). The Stolajs argue that the record did not support these findings. Because the BIA adopted and supplemented the IJ's decision, we review both decisions. Because the Stolajs are previously admitted aliens, the Government bears the burden of establishing removability by "clear and convincing evidence." 8 U.S.C. § 1229a(c)(3)(A). To reverse the IJ and the BIA's determination that the Government met this burden, this panel must find that the evidence "not only supports a contrary conclusion, but indeed compels it." *Yu v. Ashcroft*, 364 F.3d 700, 702-03 (6th Cir. 2004) (internal quotation marks omitted); *see also* 8 U.S.C. § 1252(b)(4)(B). Because the evidence does not compel a conclusion contrary to the decisions of the IJ and the BIA, and because the decisions are not "manifestly contrary to law," 8 U.S.C. § 1252(b)(4)(C), we uphold the decisions of the IJ and the BIA.

The decisions of the IJ and the BIA were properly supported by the testimony given by Berishaj during Shandorf's trial. Berishaj's testimony

clearly implicated the Stolajs in a fraudulent scheme to obtain asylum. The IJ found that "[w]hile the evidence may be insufficient to show the respondents bribed the asylum officer, the Government need only show fraud or willful misrepresentation, not bribery. Thus, the Government's failure to prove a *quid pro quo* arrangement is not determinative of whether it has proven its case." The IJ correctly stated the standard from 8 U.S.C. § 1182(a)(6)(C)(i):

> Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.

The IJ's conclusion that Berishaj's testimony supports finding the Stolajs removable under this provision is not manifestly contrary to law.

In addition, the IJ properly found that "the Government also established respondents' fraud

through respondents' own testimony." The IJ based this conclusion on the following findings:

- "The [Stolajs'] explanation of how Berishaj conveniently appeared and, in an encounter devoid of any catching up or small talk, filled out respondents' applications, and disappeared is simply unbelievable."
- "The inconsistencies between respondents' and Mrs. Gjonaj's [Diella Stolaj's sister] testimony regarding Mr. Berishaj's prior experience with applications and the discussion involving payment further detract from the credibility of testimony." · There were multiple inconsistencies in the Stolajs' descriptions of where they lived in New York. In addition, Aleksander Stolaj said that he had never heard of Yonkers, and then later remembered that that was where he lived in New York. He also stated that he took the train to work, but described the train as above ground.

- Diella's sister testified that the Stolajs were living in Detroit at the time the asylum applications were filled out and at the time of the asylum interview. She later corrected herself and said that the Stolajs were traveling back and forth between New York and Detroit because her, and Diella's, father was ill, but later testified that their father died in 1978.
- Aleksander Stolaj's withdrawal of his asylum application on the day of Diella's interview appears to indicate that he knew what the outcome was going to be.
- The Government submitted the Stolajs' fingerprint cards taken on August 8, 1996, in Detroit. "The cards contain a Hamtramck, Michigan address that had been whited-out and replaced with the Yonkers, New York address. . . . While there are a number of legitimate reasons for an address change on a fingerprint card, there is no explanation as to why the address was changed from an address at which respondents

supposedly did not reside until April or May of 1997, at least nine months after the fingerprint card was dated and at least two months after they were granted asylum."

- The findings in Officer Bastian's assessment memo indicate that Diella Stolaj's application for asylum was not actually granted on the merits.
- There were multiple inconsistencies in Diella Stolaj's asylum claims.

The BIA cited many of the same grounds in its decision. The BIA properly found "no adequate bases to disturb the Immigration Judge's finding that the respondents obtained their asylee status through fraud."

The decisions of the IJ and the BIA are supported by the documentary evidence, the transcript of Berishaj's trial testimony, and the inconsistencies in the Stolajs' testimony.[3] The IJ and

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[3]The Stolajs also argue that the IJ "mischaracterized the record of proceeding and erred in finding that petitioners were not credible." To the extent that

the BIA did not err in finding the Stolajs removable based on their fraud in obtaining asylum.

V.

The IJ properly denied the Stolajs' motion to subpoena material witnesses based on the Stolajs' failure to comply with agency procedures for obtaining a subpoena. The Stolajs argue that the IJ abused his discretion in denying their motion and that their Fifth Amendment due process rights and Sixth Amendment confrontation rights were violated. These arguments are unavailing.

The BIA correctly found that the IJ properly denied the subpoena motion because the Stolajs failed to comply with the requirements for obtaining a subpoena from an IJ. The INA states that an "immigration judge *may* issue subpoenas for the attendance of witnesses and presentation

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the Stolajs attack the IJ's conclusions based on the evidence, the decision was not manifestly contrary to law. To the extent that the Stolajs attack the IJ's factual determinations, the Stolajs do not make any arguments that show how the IJ clearly erred.

of evidence." 8 U.S.C. § 1229a(b)(1) (emphasis added). Immigration regulations state:

> A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding, what he or she expects to prove by such witnesses or documentary evidence, and to show affirmatively that he or she has made diligent effort, without success, to produce the same.

8 C.F.R. § 1003.35(b)(2). The IJ denied the Stolajs' motion because they failed to comply with the requirements of this provision. While the Stolajs' motion appears to make some attempt to show what they expected to prove with some of the witnesses,[4] the motion does not show that they had "made a diligent effort, without success, to produce the same." The IJ properly exercised his discretion and denied the subpoena motion.

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[4]The Stolajs sought to subpoena the testimony of Shandorf, Bastian, Berishaj, Vladimir Smalaj (interpreter at the asylum hearing), and "FBI agents who authored reports regarding Stolaj."

The Stolajs' constitutional claims are without merit. The Stolajs do not explain how the IJ's rejection of their motion based on failure to comply with the requirements of 8 C.F.R. § 1003.35(b)(2) violated their Fifth Amendment due process rights. In addition, the Stolajs' brief argument based on the Confrontation Clause, citing *Crawford v. Washington*, 541 U.S. 36 (2004), is inapposite because the Sixth Amendment does not apply to the Stolaj s' removal proceedings, *see Mustata v. United States Dept. of Justice*, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999).

VI.

For the foregoing reasons, we deny the Stolajs' petition for review.

CONCURRING IN PART AND CONCURRING IN THE JUDGMENT

KAREN NELSON MOORE, Circuit Judge, concurring in part and concurring in the judgment. I write separately because I believe it is unnecessary to weigh in on the circuit split concerning the applicability of the five-year statute of limitations in 8 U.S.C. § 1256(a) to certain removal proceedings. The circuit split involves the narrow question of whether § 1256(a)'s five-year statute of limitations on rescission proceedings (i.e., proceedings to rescind an alien's permanent residency status) applies to removal proceedings that are based solely on fraud or error in the procurement of permanent residency status. Three circuits have deferred to the Attorney General's opinions in *Matter of S-*, 9 I. & N. Dec. 548, 557 (A.G. 1962), and *Matter of Belenzo*, 17 I. & N. Dec. 374, 384 (A.G. 1981), and have held that § 1256(a)'s five-year statute of limitations does not apply to removal proceedings even when removal is based solely on violations or errors in the adjustment-of-status process. *See Kim v. Holder*, 560 F.3d 833, 837-38 (8th Cir. 2009); *Asika v. Ashcroft*, 362 F.3d 264, 269-71 (4th Cir. 2004); *Monet v. INS*, 791

F.2d 752, 754 (9th Cir. 1986). However, the Third Circuit has rejected the Attorney General's construction of § 1256(a) and has held that the five-year statute of limitations applies to removal proceedings when the removal proceedings are based solely on an attack on the adjustment process. *Bamidele v. INS*, 99 F.3d 557, 564-65 (3d Cir. 1996).

In my view, we need not weigh in on this circuit split because the disagreement in these cases centers on an issue that is absent from the instant case. Each of the cases cited above involved aliens whose removability was based solely on fraud or error in the adjustment process. *See Kim*, 560 F.3d at 835 (fraud in obtaining green card/adjusting status); *Asika*, 362 F.3d at 266 (erroneous adjustment by INS); *Monet*, 791 F.2d at 753 (concealment of prior conviction when seeking adjustment); *Bamidele*, 99 F.3d at 558 (fraud in adjusting status through sham marriage). By contrast, the Stolajs' removal was not based on fraud or error in the adjustment process, but rather on their fraud in obtaining asylum. There is no dispute in the case law that when, as here, removal proceedings are based on grounds

entirely separate and distinct from the adjustment-of-status process, § 1256(a)'s five-year statute of limitations does not apply. It is therefore unnecessary and imprudent for us to reach the narrower-and more difficult-question that has split the circuits. *See Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1186 (8th Cir. 2005) (concluding that § 1256(a)'s statute of limitations was inapplicable and declining to comment on *Bamidele*, *Asika*, and *Belenzo* because the removal proceedings were based on the alien's "prior conviction, not on the erroneous grant of permanent residency status"). Accordingly, I concur in the result of Part II without joining its reasoning. On the remaining issues, I concur and join in the majority opinion.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

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File: A73 624 851 - Detroit, MI Date: Jun 26, 2008
A73 624 852

In re: ALEKSANDER STOLAJ
DIELLA STOLAJ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Andrea J. Ferrara, Esquire

ON BEHALF OF DHS:
Mark J. Jebson
Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A),I&N Act [8 U.S.C. § 1227(a)(1)(A)] Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] Fraud or willful

misrepresentation of a material fact (both respondents)

Sec. 237(a)(1)(A),I&N Act [8 U.S.C. § 1227(a)(1)(A)] Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] Immigrant - no valid immigrant visa or entry document (both respondents)

APPLICATION: Termination

The respondents appeal an Immigration Judge's December 13, 2006, decision sustaining the removability charges, denying their motion to terminate the proceedings, and ordering them removed. The Department of Homeland Security (DHS) agrees with the Immigration Judge's decision. The appeal will be dismissed.

The respondents contend that the DHS was barred from initiating removal proceedings against them because they had adjusted their status to lawful permanent residents more than 5 years earlier and that status had not been rescinded in accordance with section 246(a) of the Immigration and Nationality Act, 8 U.S.C.§ 1256(a). They further

assert that the regulations governing the revocation of asylee status were applicable and were not implemented. The respondents contend that the Immigration Judge should have required proof of fraudulent activity as charged under section 212(a)(6)(C)(i) of the Act by "clear, convincing and unequivocal evidence" to revoke their lawful permanent resident status. They challenge the denial of their motion to subpoena witnesses, alleging a due process violation; dispute the Immigration Judge's characterization of the proceedings and adverse credibility findings; and argue that the Immigration Judge showed bias, asked improper questions, and exceeded his authority.

The decision sets forth the facts and we do not repeat them here. After reviewing the Immigration Judge's factual findings for clear error and conducting a *de novo* review of questions of law, discretion, and judgment, we adopt and affirm the Immigration judge's decision. *See* 8 C.F.R. § 1003.1(d)(3)(i)-(ii); *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the

record coincide with those which the Immigration Judge articulated in his or her decision").

As an initial matter, the respondents' arguments that these removal proceedings were barred because their asylee status had not been terminated and their lawful permanent resident status had not been rescinded are foreclosed by the Board's decision in *Matter of Smriko*, 23 I&N Dec. 836 (BIA 2005). In that case, we determined that a refugee who had adjusted his status to lawful permanent resident and later was convicted of crimes was not immune from removal because his refugee status had not been terminated. We find the reasoning in *Matter of Smriko* to apply to aliens like the respondents, who necessarily had to establish that they were refugees in order to obtain asylum. As aliens who obtained asylum through fraud, and who later adjusted to lawful permanent resident status despite otherwise not being entitled to such status, the respondents are not immune from removal. *See Matter of Koloamatangi*, 23 I&N Dec. 548, 550 (BIA 2003).

We find no adequate basis to disturb the Immigration Judge's finding that the respondents obtained their asylee status through fraud, based on the properly admitted transcript of the

testimony of Luigji Berishaj in the criminal trial of asylum officer John Shandorf (Exh. 2 Tab J at 6-9, 17-21). *See* 8 C.F.R. § 1240.1(a). Moreover, the respondents' story about a coincidental encounter with Berishaj, an acquaintance of the female respondent from Yugoslavia to whom she had never spoken, in a Detroit restaurant at the exact time that they intended to meet an uncle to assist in completing their asylum applications, and Berishaj's unsolicited offer to help complete the applications and assurance that "everything is okay" before disappearing, is simply improbable. Considered in conjunction with the inconsistencies between their asylum applications and their testimony about their New York address at the time they submitted their applications; the female respondent's sister's varying testimony that the respondents lived in Detroit or lived in New York but traveled to Detroit to visit their ill father whom the sister subsequently revealed had died almost 20 years earlier; and the male respondent's assertion that he withdrew his asylum application because after his wife's application was granted, his became unnecessary, yet the record shows he withdrew his application at his wife's asylum hearing and notification of the decision to grant

two weeks later[1]; we cannot say that it was clear error for the Immigration Judge to credit Berishaj's trial testimony rather than the testimony of the respondents and their witness.

The evidence establishes that the respondents were inadmissible at the time they adjusted their status because they had obtained the immigration benefit of asylum by fraud. *See* section 212(a)(6)(C)(i) of the Act. Moreover, since their asylee status was fraudulently procured, the respondents were inadmissible as immigrants with no valid visa or entry document. *See* section 212(a)(7)(A)(i)(I) of the Act. Thus, the DHS satisfied its burden of proving by clear and convincing evidence that the respondents were removable. *See* section 240(c)(3)(A) of the Act. Contrary to the respondents' argument, no heightened burden is applicable as this is a removal, not a rescission, proceeding.

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[1]The male respondent later testified that he was unaware that his wife's asylum application would be granted when he withdrew his own application, but could not explain why he decided to withdraw his asylum application.

We further reject the respondents' assertion that they were denied a full and fair hearing because the Immigration Judge denied their motion for a subpoena for material witnesses. The respondents do not refute that they failed to comply with the requirements for obtaining a subpoena pursuant to 8 C.F.R. § 1003.35(b)(2); they merely argue that the Immigration Judge had exclusive jurisdiction to issue the subpoenas and abused his discretion by not utilizing his authority and "technical equipment" to obtain witness testimony. Additionally, although the respondents contend that the Immigration Judge failed to subpoena certain DHS documents, we find no indication in the record that such a subpoena was ever requested. Moreover, we find no evidence that the Immigration Judge discarded his role as a neutral arbiter or asked improper questions exceeding the scope of his authority. The respondents have not demonstrated that they experienced a due process violation. *See Mapouya v. Gonzales*, 487 F.3d 396. 415-416 (6th Cir. 2007).

Accordingly, the following order will be entered.

ORDER: The respondents' appeal is dismissed.

/s/ Neil P. Miller
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No: A73-624-851
A73-624-852

December 13, 2006

In the Matter of:
STOLAJ, Aleksander In Removal Proceedings
STOLAJ, Diella

Charges: Section 237 (a) (1) (A) of the Immigration and Nationality Act ("Act"), as amended, -inadmissible at time of entry or adjustment of status under § 212(a) (6) (e) (I)-procured immigration benefit by fraud or willful misrepresentation of a material fact.

Section 237(a) (1) (a) of the Act, as amended, inadmissible at time of entry or adjustment of status-immigrant not in possession of a valid immigrant visa or entry document.

Application: Termination of Proceedings

ON BEHALF OF RESPONDENT
Aridrea Ferrara, Esq.

D-1

ON BEHALF OF THE GOVERNMENT
Mark Jebson
Deputy Chief Counsel

DECISION AND ORDERS OF THB COURT

I. BACKGROUND

Female respondent is a 43-year-old female native of Yugoslavia and citizen of Albania. Male respondent is a 38-year-old male native and citizen of Albania. Both respondents first entered the United States as nonimmigrant visitors for pleasure on February 26, 1996. On December 18, 1996, respondents each filed administrative applications for asylum. See Exhibit 2, Tabs A, B. Male respondent withdrew his application on January 23, 1997, and his wife requested that he be included on her application. See Exhibit 2, Tab C. Female respondent's asylum application was granted on February 6, 1997. See Exhibit 2, Tab H. Pursuant to that grant, both respondents adjusted to lawful permanent resident status on October 1, 1998. Notices to Appear ("NTA") for both respondents were filed November 1, 2003, charging each respondent with procuring their asylum through fraud and being inadmissible at

the time of adjustment of status as their asylee status was procured by fraud and they had no other valid visas or entry documents. See Exhibits 1, 1A.

Respondents filed a motion to terminate the proceedings on February 9, 2004 arguing that the Government failed to provide the requisite notice of intent to terminate asylee status. Ata February 12, 2004 hearing, the Court notified respondents that the motion would be denied because their status was no longer that of asylees, but instead they were lawful permanent residents, and the procedures for revocation of asylee status did not apply.

At the same hearing, female respondent admitted factual allegations 1-6, and male respondent admitted factual allegations 1-7. Female respondent denied allegation 7, alleging that she procured asylum by fraud by paying a supervisor $3000 to change her denial to a grant, and allegation 8, alleging that she was inadmissible at the time of adjustment of status because she did not possess or present a valid immigrant visa or valid entry document. Male respondent denied two identical allegations, numbered 8 and 9 on his NTA. Both respondents denied the charges of

removability. Respondents indicated their intent to apply for asylum, withholding of removal, and voluntary departure. The Court designated Albania as the country of removal in both cases, with Yugoslavia designated in the alternative for the female respondent. April 27, 2004 was set as the date for the filing of applications.

On April 16, 2004, respondents filed a motion to dismiss the charges for a lack of specificity as to factual allegations 7 and 8 on the female respondent's NTA (allegations 8 and 9 on male respondent's NTA). On that date, respondents also filed a motion to administratively close removal proceedings due to an upcoming naturalization interview and a motion to extend the time for filing the asylum applications until the Court rules on the motion for administrative closure. All three motions were denied on April 20, 2004.

At the April 27, 2004 hearing, respondents indicated that they did not plan on filing applications for asylum. In response to respondents' concerns regarding the specificity of the allegations, the Government provided respondents with the names of two individuals involved in the alleged fraud, John Shandorf and Luigji Berishaj.

On June 23, 2005, a motion for a continuance was filed arguing that a continuance was merited due to the Government's voluminous submissions to the Court and the respondents' intention to request subpoenas and to file a motion to suppress Government evidence. On June 30, 2005, the motion was denied on because the Government's submissions raised no new issues and the motion contained no indiction of what witnesses respondents would like to subpoena or the grounds for suppression of the Government's exhibits.

Respondents submitted a renewed motion to terminate containing a request for a change of venue, a motion for a continuance, and a motion to subpoena material witnesses and or strike the Government documents, Exhibit 2 for identification, Tabs A-L, on July 6, 2005. That same day, all motions were denied. The motion to terminate argued the Government failed to follow the proper procedures for revocation of asylee status. The motion was again denied because as legal permanent residents, the asylum revocation procedures are irrelevant to the respondents. The motion for a continuance was also denied as there was no showing of new evidence or issues or that the prior

denial of a continuance was in error. Finally, the renewed motion to subpoena material witnesses and strike Government documents, Exhibit 2 for identification, Tabs A-L, was denied. The Court chose to treat the motion to strike as objections to the admission of the documents to be addressed at the hearing. The Court denied the motion to subpoena because respondents failed to comply with 8 C.F.R. § 1003.35(b) (1). The motion contained absolutely no indication that respondents had made any effort to have the witnesses voluntarily appear and testify before requesting the subpoena.[1]

A merits hearings was held on July 7, 2005. Both respondents testified. The Government submitted documentary evidence, marked for identification as Exhibit 2, Tabs A-L, to which

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[1]Respondents filed an interlocutory appeal from the denial of their motion with the Board of Immigration Appeals ("Board") on August 5, 2005. On November 29, 2005, the Board denied respondents' request for interlocutory review citing the standard for accepting an interlocutory appeal and finding that "the circumstances of this case [do not] meet this stringent criteria for interlocutory review."

respondents had numerous objections as discussed below. At the close of the hearing, respondents requested a continuance to allow them to collect more evidence on respondents' residence in New York and to present additional witnesses. The Court granted a six month continuance and scheduled a hearing for January 13, 2006. The Government filed a motion for a continuance on December 5, 2005 due to a scheduling conflict. The motion was granted and the hearing was rescheduled for November 1, 2006.

At the November 1, 2006 hearing, respondent presented additional testimony from female respondent's sister. The Government also called female respondent to testify for a second time. The respondents then withdrew their applications for voluntary departure.

As discussed below, the Court finds the Government has proved the charges against the respondents by clear and convincing evidence.

II. POSITIONS OF THE PARTIES

The Government asserts respondents acquired their asylee status through the improper influence of Luigji Berishaj. Berishaj arranged to

have asylum supervisor, John Shandorf, ensure 'that respondents' asylum applications would be granted regardless of merit. Berishaj filled out respondents' applications for them and filed them. Because respondents were living in the Detroit, Michigan area, Berishaj instructed respondents to use a New York address as their residence to place themselves within the jurisdiction of the asylum office where Shandorf worked. Respondents used a Yonkers, New York address. They were interviewed and notified shortly thereafter that their application was granted. After respondents were granted asylum, they paid Berishaj $2000, of which $1500 was passed on to John Shandorf. John Shandorf was eventually convicted for his role in the scheme, and Luigji Berishaj, pled guilty to chargee based on his involvement. Because respondents acquired their asylee status by fraud, respondents are removable. In addition, the Government argues that respondents are removable because at the time of adjustment of status, the basis for their adjustment, their asylee status, was based on an invalid asylum application containing incorrect information.

Respondents argue that they did not pay any money in connection with their asylum

application and they were actually living in New York at the time of the application. Because they were lawfully granted asylee status, their adjustment of status was valid, and they are entitled to remain in the United Status as lawful permanent residents.

III. LEGAL STANDARDS

The Government has the burden of showing an alien admitted to the United States is removable by clear and convincing evidence. INA § 240(c) (3) (A). An alien who procures an immigration benefit by fraud or willful misrepresentation of a material fact is inadmissible. INA § 212 (a) (6) © (I). The Board has defined fraud as a "misrepresentation of a material fact, made with knowledge of its falsity and with intent to deceive the other party." Matter of B—, 6 I &N 806, 807 (BIA 1955). The requisite willfulness for a willful misrepresentation is established when the respondent "acted with knowledge that his conduct was unlawful." See U.S. v. Chowdhury, 169 F.3d 402, 407 (6th Cir. 1999). Furthermore, an alien is inadmissible if the alien is not in possession of a

valid immigrant visa or entry document at the time of adjustment of status.

IV. EVIDENCE OF RECORD

To sustain its burden, the Government called both respondents as witnesses. The Government also submitted documents relating to respondents' asylum cases and the asserted fraud. Because respondents made a number of objections to the documentary evidence, the Court will discuss the admissibility of the contested evidence below. Respondents submitted the testimony of Dilja Gjonaj, female respondent's sister.

A. Documentary Evidence

Exhibit 2, Tab A and B are respondents' applications for asylum. Both male and female respondents identified their respective applications, testified as to their preparation, and identified their signatures on the applications. Furthermore, respondents themselves submitted documents from a Freedom of Information Act request, including the above-mentioned applications, and they were admitted without objection as Exhibit 4. As such, the Court admitted Exhibit 2, Tabs A and B into evidence.

Exhibit 2, Tab C consists of the withdrawal of male respondent's asylum application. Tab C was admitted without objection.

Exhibit 2, Tab D is the record of interpreter's oath from the asylum interview. Although respondents objected to its admission, they also submitted the same document as part of Exhibit 4, which was admitted without objection. Because neither party established its relevancy, Exhibit 2, Tab D was not admitted.

Exhibit 2, Tab E contains the first page of the assessment/referral memorandum of the asylum officer who interviewed female respondent as well as what appears to be the officer's handwritten notes. No subsequent pages are included. Respondents objected to its admission based on its incompleteness and the absence of authentication. The Government requested it be admitted to show the asylum officer's intent to deny their applications, and not for the truth of the matter asserted. The document provides female respondent's name, alien number, and the date of her asylum interview. Although the document is not complete, the section submitted is sufficient to establish the officer's intent to deny. As it provides every indication of being what it purports to be,

the Court admitted it for the limited purpose of showing the asylum officer's intent to deny female respondent's application.

Exhibit 2, Tab F is a notice containing the date female respondent was to return to the asylum office to pick up her decision. Respondents objected to the document based on a lack of foundation. Because the document was not authenticated and was irrelevant, Tap F was not admitted.

Exhibit 2, Tab G appears to be a computer print-out detailing the history of respondents' asylum case. Respondents objected due to lack of foundation. The document is unsigned and merely provides a summary of information available elsewhere. Because no testimony was offered to authenticate the document, Tab G was not be admitted.

Exhibit 2, Tab H is a letter notifying respondent that her asylum application was granted. As there was no objection to this evidence, Tab H was admitted.

Exhibit 2, Tab I consists of form FD-302 recording the investigation of the Federal Bureau of Investigation into the alleged bribery scheme. Respondents objected because the document

was not authenticated and they could not cross-examine the author. Because the records are not self-authenticating and no testimony was offered to authenticate them, Tab I was not admitted.

Exhibit 2, Tab J is a computer-assisted transcript of the trial of John Shandorf. Respondents objected on the grounds that it was incomplete, it was not authenticated, and its admission violates the Confrontation Clause of the United States Constitution. The Court notes that the Confrontation Clause applies only in criminal proceedings and immigration proceedings are civil. See U.S. Const. Amend. VI; Woodby v. I.N.S., 386 U.S. 276, 285 (1966). Although the transcript is hearsay, the testimony of Luigji Berishaj would be admissible even under the Federal Rules of Evidence as an admission against penal interest. Fed. R. Evid. 804(b) (3). Furthermore, hearsay is admissible in removal proceedings as long as its admission is not fundamentally unfair. Alexandrov v. Gonzales, 442 F.3d 395, 404-05 (6th Cir. 2006). In this case, respondents submitted a motion requesting a subpoena that was denied because it failed to comply with 8 C.F.R. § 1003.35(b) (1). Respondents made no attempt to make another

request for a subpoena correcting the deficiencies in the prior motion. As such, respondents cannot now claim that the admission of the hearsay is fundamentally unfair when they apparently failed to take any steps to procure the testimony of the witness on their own or to submit a proper subpoena request.

Because the Government's initial submission was in fact incomplete, the Court ordered the Government to submit the trial transcript in its entirety, which it did on August 19, 2005, curing any objection on grounds of incompleteness.

Finally, the Court found that the transcript has been sufficiently authenticated even though it was not certified. The transcript is a computer-assisted transcript that was generated immediately as the testimony was given and reviewed by the court reporter. The transcript lists the name of the court reporter, acting much like an electronic signature that verifies the information contained in the transcript. The transcript gives every indication of being what it purports to be, the key issue under Federal Rule of Evidence 901, and respondents have not raised any serious objection to its authenticity. Under these circumstances, the transcript is self-authenticating.

See Buziashvili v. Inman, 106 F.3d 709, 717 (6th Cir. 1997). Therefore, Exhibit 2, Tab J was admitted.

Exhibit 2, Tab K is a certified copy of the indictment of John Shandorf. Respondents objected because there was no authentication, it is immaterial in that it does not name the respondents, and there is no ability to cross-examine. The indictment is self-authenticating because it is a certified copy of a public record. Fed. R. Evid. 902(4). Although the document is hearsay, there is no indication that its admission was fundamentally unfair. See Alexandrov, 442 F.3d 404-05. In addition, the link to respondents is sufficiently established because the indictment provides the date of respondents' asylum grant and indicates the individual granted was Yugoslavian. As such, Exhibit 2, Tab K was admitted.

Exhibit 2, Tab L was withdrawn by the Government and was not admitted into evidence.

B. Male Respondent's Testimony

Male respondent was born February 21, 1968 and married female respondent in Albania in 1994. He came to the United States in February 1996 with his wife and entered on a visitor's visa valid for

somewhere between six months and a year. He has not left the United States since entering. He flew into Chicago and then came to Detroit where his wife's sister lives. Male respondent and his wife lived with his wife's sister in Hamtramck for two months. On male respondent's asylum application, he does not list this residence and instead states that he moved to New York on February 26, 1996. Respondent claimed he did not include his two month Michigan residency because it was temporary.

In April 1996, he and his wife moved to New York where male respondent's cousins live in the hope that he could find a job. In New York, male respondent testified that they lived at 495 Odell, Bronx, New York. He was not sure if he lived in the same city as his cousins. After being shown his asylum application in which he listed an address in Yonkers, New York, he testified that he was not sure where he lived and he only knew that his cousins lived in Bronx. With his cousin's help, he found a job at a pizza restaurant near his cousin's house. He was unable to testify as to the city in which the restaurant was located, but said he traveled there by train. Male respondent worked for two to three months for cash, but was fired in June when his

boss was unable to continue paying him under the table. He did not work from June until he returned to Michigan in April or May of 1997 and was supported by his cousins and his wife's family.

Male respondent rented a house through his cousin, who actually signed the lease. The house had two floors, but respondents lived only on the lower floor. A Mexican family lived above them and entered their apartment through a different door. Male respondent testified that he did not remember any separate apartment numbers. Although he testified he took the train to work, he was unable to say what train he took. When asked whether the train was above or below ground, he said it was above ground. When asked about Yonkers, New York, he stated he had never heard of it. Later he remembered that it was the city where he lived in New York. Male respondent testified that he and his wife only traveled to Detroit on the one occasion during which they filled out the asylum applications and possibly another time.

When his wife's sister told him she would find him a job, male respondent and his wife returned to Michigan in April 1997. They lived with his wife's family for a week and then moved to their own

place at 2367 Casmere, Hamtramck. After living at that address for three years, respondents bought a house and moved to 35558 Remington, Sterling Heights, where they are currently living.

Male respondent testified that he applied for asylum in December 1996 or January 1997. His wife's sister told him about the availability of political asylum. About a month and a half before submitting the application, he went with his wife and her sister to pick up the application at a travel agency in Hamtramck. After picking up the application, they went to a restaurant to get some food and to wait for female respondent's uncle to come assist them in filling out the forms. Luigji Berishaj came into the restaurant and recognized female respondent from Yugoslavia. They talked, and Berishaj offered to help fill out the asylum applications. Berishaj said nothing about having filled out other asylum applications. Berishaj would ask each question, respondents would reply, and Berishaj would write the statement in English. After completing the form, Berishaj read it back to them. Berishaj offered to mail the applications with an envelope obtained at the travel agency. Male respondent denied giving Berishaj any money. In

exchange for his help and also stated that no one else gave Berishaj any money on his behalf.

Male respondent received a notice for an interview at his home in New York. He and his wife went to the interview around January 23, 1997. The asylum officer and an Albanian interpreter, who male respondent had never met before, were the only people at their interview. The officer asked female respondent if she wanted to include male respondent on her application and she said yes. Male respondent then withdrew his application. When asked why male respondent withdrew his asylum application, he stated that he did not need his application after his wife was granted asylum, but also stated, incongruously, that they did not know his wife had won her claim until later. At the interview, male respondent was asked questions about his wife, and then all further questions were directed at female respondent. They were told they would receive a decision by mail within two weeks. About two weeks later, they received a letter stating that they had been granted asylum.

Male respondent testified that neither he nor his wife had any additional communication with Berishaj after the meeting at the restaurant. He claimed to have no knowledge of the conviction

of an asylum officer or Berishaj's testimony during his trial, although he knew he was in proceedings because Berishaj lied about the respondents giving him money. He also stated he did not know Ljubo Stanaj.

C. Female Respondent's Testimony

Female respondent testified that she was born on May 2, 1963. She was raised by her uncle in Yugoslavia since she was three months old. She met her husband through his cousins. She went to Albania to meet him and married two or three months later. She moved to Albania when she was 28 or 29 years old. She knew Berishaj from church in Yugoslavia and had known him since she was sixteen years old. In Yugoslavia, she saw him maybe once a year, but never spoke with him. The only contact she had with Berishaj in the United States (and the only time she had ever spoken to him anywhere in the world) was the day he helped her and her husband fill out their asylum applications at the restaurant.

Female respondent picked up her asylum application from a travel agency in Michigan. She went to a restaurant with her husband and sister. They were planning on meeting her uncle there

because he spoke English and could help with the applications. Berishaj came in and recognized her. He asked her what she was doing, and she told him she was waiting for her uncle to fill out the applications, which were still in the envelope at the time. Then Berishaj offered to help fill out the applications. Berishaj did not mention filling out any other applications, but did tell female respondent that he knew how. She said Berishaj would read the question, she would answer, and he would write it down. He also went over her application with her after it was completed. The whole process took about an hour. Berishaj offered to mail the application for them. Neither female respondent nor anyone else gave Berishaj any money. Female respondent has had no further contact with Berishaj and did not exchange contact information with him at the restaurant. They did not discuss when Berishaj came to the United States or where he was currently living.

Female respondent testified that they moved to New York because her husband's cousin said he could find a job for him. Her husband had looked for work in Detroit, but was unsuccessful. She did not work in New York. She said they lived in a house with two apartments, and another family

lived upstairs. She did not live with Lucy Kacaj and did not know who she was. She returned to Detroit five or six times while living in New York, and her husband came with her every time except on one trip. They generally flew, but once they drove. Her sister paid for the trips.

Female respondent asserted she had no knowledge of an asylum officer being prosecuted or of Berishaj testifying. None of the rest of her family knew Berishaj. They never informed Berishaj of the outcome of the asylum application.

Female respondent stated that she did not remember having her fingerprints taken in Detroit, Michigan. The Government showed her a fingerprint card dated August 8, 1996 showing that they were in fact taken in Detroit, Michigan. See Exhibit 3. She did not remember if she was visiting Detroit on that date; but, she insisted that she was living in New York at the time.

Female respondent testified that she was never arrested in Albania. When ,asked about her statement in her asylum application that she was arrested and held for ten days, she stated that it was her husband that was detained for ten days. She said it was not fifteen days, and she knew that because she was there. When confronted with her

husband's statement on his application that he was detained for fifteen days, she said she was not sure, but he spent ten to fifteen days in jail. Later respondent testified that she had been arrested, but not jailed. She went to church with her husband, and was laughed at because she brought the "democrat." They tied her up for four to five hours. They were going to take her to jail, but her husband's cousin intervened.

D. Dilja Gjonaj's Testimony

Mrs. Gjonaj has been a lawful permanent resident of the United States for the last thirty-one years. She never became a citizen because she cannot read or write in any language. Female respondent is Mrs. Gjonaj's sister.

Mrs. Gjonaj went with her sister and her husband to a travel agency in Hamtramck to get an application for asylum. The application was filled out in a restaurant in Hamtramck. After they arrived at the restaurant, Mrs. Gjonaj called her uncle, a United States citizen who spoke English, to come help them fill out the applications. Berishaj recognized female respondent and asked where she got her application. Berishaj offered to assist them with the application. He said he "was doing

this type of job" - meaning filling out papers. He told them that when he filled out the papers "everything is okay."

Berishaj then sat at the table with them and filled out the forms. They spoke mostly in Yugoslavian, and Mrs. Gjonaj does not speak much Yugoslavian. Mrs. Gjonaj asked him how much he charged for filling out applications, and he said nothing. She even took out a twenty dollar bill and offered it to him, but he would not take it. Instead, he told her that he helps fill out papers for those who do not know how to speak English. Mrs. Gjonaj never saw any money change hands. Mrs. Gjonaj's uncle finally arrived as they were leaving the restaurant.

Mrs. Gjonaj said female respondent came home happy from the asylum interview. First, Mrs. Gjonaj referred to a promise, but stated there was no guarantee. She later testified that she did not know about any promises. She clarified that female respondent did return home after the interview. When asked whether she came back to Michigan, Mrs. Gjonaj said female respondent returned to Michigan after finishing in New York, but Mrs. Gjonaj was unsure how long female respondent stayed in New York after finishing with the interview.

On redirect, Mrs. Gjonaj was asked again where her sister was living at the time of her interview in 1997, and she responded that she was living in Detroit.

Mrs. Gjonaj testified that at the time they filled out the applications, the respondents were living at her house in Hamtramck. She then said they sometimes lived in New York. When asked where they were residing, she said they spent more time in New York. Still later, Mrs. Gjonaj said after the meeting at the restaurant, respondents returned to New York.

Mrs. Gjonaj never went to visit them in New York. Male respondent found a job a pizza restaurant in New York fairly quickly after moving to New York. Mrs. Gjonaj was not sure which city they lived in, but one of the phone numbers she called Was in the Bronx. She had three numbers for them, a home number, a work number, and a number for male respondent's cousins. She believed respondents lived in an apartment.

Mrs. Gjonaj's brother, mother, and father lived with her during this time period. Respondents would come visit her in Michigan while they were living in New York. One time Mrs. Gjonaj paid for the ticket because her father had been sick for

eight months; other times respondents came by bus or male respondent's cousin drove them. Mrs. Gjonaj picked them up at the bus station when they came. They were going back and forth because. Mrs. Gjonaj and female respondent's father was sick, and as a result female respondent came more than male respondent until her father died. Mrs. Gjonaj testified he died April 11, 1978. She was unable to explain how he died in 1978 if her sister was not in the United States until 1996. Mrs. Gjonaj testified that the respondents moved back to Michigan after about a year. She was able to get a job for male respondent working at a restaurant.

Mrs. Gjonaj says she had a strong relationship with her sister. She did not know if her sister had been arrested in Albania, although she said her sister's husband had been.

V. DISCUSSION, FINDINGS, AND CONCLUSIONS

The Government has proven through clear and convincing evidence that the respondents were granted asylum through fraud. The Government has provided a transcript of a criminal proceeding containing the sworn testimony of the

individual who respondents admit completed their applications for them stating that respondents received their asylum due to the improper interference of an asylum supervisor, John Shandorf, who was paid for his help. The Government presented the incredible testimony of the respondents on the circumstances concerning their encounter with Berishaj. Finally, the Government showed that the claimed New York residence was a misrepresentation provided to ensure that the respondents would be able to benefit from Berishaj's relationship with John Shandorf.

In addition, the Government established that respondents are also removable because there was no valid basis for their adjustment of status. As the Government has shown that the asylum and following adjustment were obtained by fraud, and as respondents admitted originally overstaying their visas, the Government has proven the respondents have no valid documents.

A. Respondents Are Removable Due to Fraud or Willful Misrepresentation in Their Asylum Applications.

1. Berishaj's Testimony

The Government submitted the transcript of John Shandorf's criminal case, including the testimony of Luigji Berishaj. In his testimony, Berishaj stated that he met with Shandorf regarding the Stolajs. See Exhibit 2, Tab J at 263.[2] Berishaj told Shandorf they lived in Detroit. Id. at 264. Shandorf advised Berishaj to have them use a Westchester address. Id. Berishaj said he completed an application for male respondent and his wife and mailed it to the Vermont Service Center. Id. Berishaj informed Shandorf of the Stolaj's upcoming interview. Id. at 264-65. Shandorf told Berishaj to wait for him in the cafeteria, and from there Berishaj could see Shandorf in the Asylum Office signaling for them to come up. Id. at 265. Berishaj testified that Shandorf interviewed the Stolaj's, although he may have been assisted by another officer. Id. The Stolajs were granted asylum. Id. After they received asylum, Berishaj met with

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[2] Citations are from the complete transcript of John Shandorf's case, submitted by the Government on August 19, 2005.

Shandorf again. Id. at 266 He then informed Berishaj that he should give him something for his help. Id. When asked how much, Shandorf stated at least $1000. Id. at 267. Berishaj told male respondent that someone helped him get asylum, so he needed to give him some money. Id. Male respondent gave Berishaj $2000, of which Berishaj gave $1500 to Shandorf. Id. at 268.

Respondents argue that Berishaj's testimony is not credible because Berishaj was also charged in connection with the scheme and pled guilty. See Exhibit 2, Tab J at 252. His testimony was pursuant to a cooperation agreement. See id. at 253. Although Berishaj clearly benefitted from his testimony in the form of a reduced sentence, he testified regarding a number of fraudulent asylum claims. There is no indication he gained anything by including respondents in the list of individuals he assisted in procuring asylum by fraud. Respondents argue that they might have been included to cover-up a pattern of Berishaj assisting his relatives gain asylum. Berishaj's self-incriminating testimony laid out his illegal activities in regard to his relatives, leaving little to cover-up. As a result, the Court finds Berishaj's sworn testimony, which is consistent with his guilty plea, credible.

2. Respondents' Testimony

In addition to Berishaj's incriminating testimony, the Government also established respondents' fraud through respondents' own testimony. The respondents' explanation of their relationship with Berishaj is implausible. Respondents both testified that they went to the restaurant to fill out the forms. They called female respondent's uncle to assist them because they did not speak English; however, they did not arrange for the uncle to meet them until after they arrived at the restaurant. By sheer coincidence Berishaj, an individual female respondent knew from Yugoslavia, appeared. In fact, this was the first time female respondent had ever spoken to Berishaj, including her time in Yugoslavia. Although they had no discussion of personal matters, such as where Berishaj was living or when he came to the United Sates, and they did not exchange any contact information, Berishaj offered to fill out asylum applications for them on the spot. Respondents testified he did not mention ever filling out applications before, yet they trusted him with their application. Mrs. Gjonaj, however, testified that Berishaj told them that filling out applications for people who do not speak English

was Berishaj's job. Furthermore, Berishaj told them that when he fills out the application, "everything is okay." Mrs. Gjonaj also testified that she asked him how much he charged and offered him twenty dollars, something both respondents. omitted from their testimony. After filling out the applications, Berishaj quickly left, never to be heard from again. This explanation of how Berishaj conveniently appeared and, in an encounter devoid of any catching up or small talk, filled out respondents' applications, and disappeared is simply unbelievable. The inconsistencies between respondents' and Mrs. Gjonaj's testimony regarding Mr. Berishaj's prior experience with applications and the discussion involving payment further detract from the credibility of testimony.

Respondents' testimony also belies their claim of New York residence at the time of the application. Respondents described their residence as a house with an upstairs and downstairs apartment. They lived downstairs, and another family lived upstairs. Male respondent could not remember an apartment number. On their asylum applications, both respondents listed the apartment number as 3c, presumably an apartment number in a building that contained

more than two apartments. In addition, their asylum applications list their mailing addresses as in the care of Lucy Kacaj and list the address they claim was their residence in Yonkers. Female respondent stated they did not live with Lucy Kacaj, and she had never heard of her. It appears likely that Lucy Kacaj lent respondents her mailing address for the purpose of their asylum applications.

Male respondent first stated he lived in the Bronx at the Odell address. Then he was unsure of what city he lived in. When asked whether he had ever heard of Yonkers, New York, he said he had not. Later he realized that he in fact bad heard of Yonkers because it was where he had lived when he lived in New York. Male respondent testified that he took the train to work, at least on a number of occasions, but could not testify as to which train he took. In describing the train system in New York, he stated that the trains were above ground.

Mrs. Gjonaj's testimony further solidified the conclusion that respondents never lived in New York. Mrs. Gjonaj slipped and testified that they were living in Detroit at both the time the applications were filled out and at the time of the asylum interview. She later corrected herself and

stated they were going back and forth between Michigan and New York because her father was sick and continued traveling frequently until her father passed away. When asked for the date of her father's death, Mrs. Gjonaj again slipped and stated in response to two questions that he died in 1978.

All three of the witnesses testified inconsistently on the frequency of trips between Michigan and New York. Male respondent said there was only one, possibly two trips. Female respondent said there were five to six trips, all by plane and financed by her sister except one trip where they traveled by car. Mrs. Gjonaj testified that they came primarily by bus or on one occasion by car, and Mrs. Gjonaj paid for only one plane trip.

Furthermore, male respondent acted as though he knew the outcome of his wife's asylum application when they went to female respondent's interview. The day of female respondent's interview, male respondent withdrew his asylum application, prior to any indication that female respondent would be successful on, her application and despite the fact that he had an independent claim of arrest and detention. In his

testimony, male respondent explained that he withdrew his application because it was no longer needed after his wife was granted. When questioned further regarding whether he knew his wife's application had been granted when he withdrew his application, male respondent claimed he did not know why he withdrew the application. Male respondent's testimony indicates that on the day of his wife's interview, he knew that his wife's asylum grant was secured, so much so that he was willing to forgo the opportunity to seek asylum based on his own claims. Clearly, respondents had received no official indication of an asylum grant, and it seems unlikely that the interviewing asylum officer gave them the impression that their application would be granted when he wrote a memorandum just one day later recommending the application be denied. Therefore, male respondent's withdrawal of his own application indicates that he had some outside assurance that his wife's application would be granted.

Additionally, the Government presented fingerprint cards for both respondents taken on August 8, 1996 in Detroit, Michigan, which were admitted without objection. See Exhibits 3, 5. They

were apparently submitted in connection with respondents' asylum applications.[3] The cards contain a Hamtramck, Michigan address that had been whited-out and replaced with the Yonkers, New York address. While the evidentiary value of the cards is limited because no testimony was offered as to when the change was made, the letters "Cas" and "r" are visible on the first line of the Hamtramck address. Male respondent testified that after respondents moved back from New York they stayed with female respondent's sister for a week and then got their own place at 2367 Casmere, Hamtramck. While there are a number of legitimate reasons for an address change on a fingerprint card, there is no explanation as to why the address was changed from an address at which respondents supposedly did not reside until April or May of 1997, at least nine months after the fingerprint card was dated and at least two months after they were granted asylum.

Moreover, the Government demonstrated that female respondent was not granted asylum

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[3]At that time, asylum applicants were required to file fingerprint cards with their asylum applications. 8 C.F.R. § 208.3(a) (1996).

on the merits of her claim. The Government submitted the assessment memo of the asylum officer who conducted female respondent's interview. See Exhibit 2, Tab E. The memo clearly states the officer's intent to deny the application stating "applicant has not shown any past persecution" and going on to say "applicant's fear of future persecution in Albania is not sustained by the Acosta 4 prong test . . . . ." Id.

In addition to documentary evidence of the asylum officer's intent to deny, the Government questioned the female respondent on the facts underlying her asylum claim. When asked whether she had ever been arrested, female respondent initialed testified that she had not. She later explained that she had been arrested at the church. She was tied up for four or five hours, but she was never sent to jail or otherwise detained. When confronted with her asylum application which stated she had been arrested and detained for ten days, she stated that it was her husband who had been arrested and detained for ten days. When asked whether she was sure it was ten days and not fifteen days, she affirmed that her husband was jailed for ten days. Only when confronted with her husband's statements in his

asylum application that he was detained for fifteen days did female respondent explain that the event occurred ten years ago and to the best of her recollection the detention lasted somewhere between ten and fifteen days. In addition, female respondent's sister testified that female respondent never told her she was arrested, despite their "strong" relationship. While ten years have passed since respondents' applications, respondent's inability to testify consistently with her asylum application on the most basic facts going to the heart of her claim demonstrates that the incredible statements in respondents' asylum application were never sufficient to establish past persecution or a well-founded fear of future persecution.

To sustain the fraud charge, the Government must show fraud or a willful misrepresentation of a material fact. Respondents argue that the Government did not carry its burden because the only testimony offered to show respondents bribed the asylum officer was the transcript of Berishaj's testimony from which it appears there was no agreement prior to the grant of asylum that the respondents would pay a bribe in exchange for asylum. Instead, Shandorf requested payment only after asylum was granted. While the evidence may

be insufficient to show the respondents bribed the asylum officer, the Government need only show fraud or willful misrepresentation, not bribery. Thus, the Government's failure to prove a *quid pro quo* arrangement is not determinative of whether it has proven its case.

Respondents' and Mrs. Gjonaj's testimonies show that respondents willfully misrepresented their address on their asylum applications. All three testified inconsistently and incredibly on the issue of the respondents' residence at the time the application was filed, leading the Court to find that their residence was in fact in Michigan. The transcript of Berishaj's testimony establishes that when Shandorf learned the respondents lived in Detroit, he told Berishaj to have the respondents use a New York address to place them within the jurisdiction of the asylum office in which Shandorf worked. Respondents did, in fact, use a false New York address on their asylum applications, which they certified as true and correct under penalty of perjury. The use of the false address demonstrates respondents were aware of the scheme to fraudulently procure asylum and willingly participated in it. As such, the charge of

removability has been sustained by clear and convincing evidence.

B. Respondents Are Removable Because at the Time of Their Adjustment of Status, They Had No Valid Entry Documents.

The Government has also carried its burden on the second charge of removability by showing that respondents had no valid entry documents when they adjusted their status. As discussed above, the Government proved that respondents' asylee status was procured by fraud. Respondents admitted that their original visitor visas had expired. As such, the Government has shown clearly and convincingly that respondents did not possess any valid documents at the time of their adjustment of status.

As the Government has proven both charges by clear and convincing evidence, the respondents will be ordered removed.

ORDERS

IT IS HEREBY ORDERED that Aleksander Stolaj be removed from the united States to Albania on the charges contained in his Notice to Appear.

IT IS FURTHER ORDERED that Diella Stolaj be removed from the United States to Albania, or in the alternative to the former Federal Republic of Yugoslavia, on the charges contained in her Notice to Appear.

/s/ Robert D. Newberry
Robert D. Newberry

U.S. Immigration Judge

No. 09-1014

In the Supreme Court of the United States

ALEKSANDER STOLAJ, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. 1256(a)'s five-year limitation on the government's authority to rescind the grant of an adjustment to permanent resident status also precludes the initiation of removal proceedings based on fraud in the preceding grant of asylum.

2. Whether the court of appeals erred in affirming both the denial of petitioners' subpoena requests and the ultimate finding that petitioners had obtained asylum by fraud.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B30) is reported at 577 F.3d 651. The decisions of the Board of Immigration Appeals (Pet. App. C1-C8) and of the immigration judge (Pet. App. D1-D40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2009. A petition for rehearing was denied on November 25, 2009 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on February 20, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 1256(a) of Title 8 states:

> (a) If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to remove the alien under section 1229a of this title, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 U.S.C. 1256(a).

Although Section 1256(a) was originally enacted in 1952, its last sentence was added by a 1996 amendment. See Immigration and Nationality Act (INA), ch. 477, § 246(a), 66 Stat. 217, amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 378(a), 110 Stat. 3009-649.[1]

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[1] In 2003, the Immigration and Naturalization Service ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security (DHS). See Homeland Security Act of 2002, Pub. L. No. 107-296, 116

b. The following regulation governs a party's application for a subpoena to compel the appearance of a witness to testify in removal proceedings before an immigration judge:

> (2) *Application for subpoena.* A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding, what he or she expects to prove by such witnesses or documentary evidence, and to show affirmatively that he or she has made diligent effort, without success, to produce the same.

8 C.F.R. 1003.35(b)(2).

2. Petitioners, husband and wife, are natives and citizens of Albania. They entered the United States as non-immigrant visitors in February 1996. Later that year, petitioners applied for asylum. Pet. App. B3, D2. With the assistance of a man named Luigji Berishaj, petitioners, though residing in Michigan at the time, provided a New York address, filed their asylum applications with the Vermont Service Center, and traveled to New York for the asylum interview. *Id.* at B4, B6.[2] Despite the interviewing officer's written assessment that the wife "has not shown any past persecution" and that her "fear of future persecution in Albania is not * * * well founded[]," her asylum application was granted (with derivative asylum for her husband) in February 1997. *Id.* at B4. On October 1, 1998, based on

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Stat. 2135. The text of 8 U.S.C. 1256(a), however, has not yet been amended to reflect that rescission authority now lies with the Secretary of DHS and not the Attorney General.

[2] The husband withdrew his asylum application on the day of the interview and requested that he be included on his wife's application. Pet. App. B3.

the grant of asylum, petitioners' status was adjusted to that of lawful permanent resident. *Ibid.* That adjustment was made retroactive to October 1, 1997. Administrative Record 1904 (A.R.).

During that time, John Shandorf was employed as a Supervisory Asylum Officer with the Immigration and Naturalization Service (INS) office in New York. Pet. App. B3-B4. Shandorf was later indicted and convicted for accepting bribes in return for approving asylum applications. *Id.* at B4-B5, B7; A.R. 1794. During Shandorf's criminal trial, Berishaj testified that he had arranged for Shandorf to grant asylum to petitioners (among others) and that he had paid Shandorf for his help with money obtained from petitioners. Pet. App. D28-D29.

3. On July 9, 2003, the Department of Homeland Security (DHS) served petitioners with Notices to Appear charging them with removability under 8 U.S.C. 1182(a)(6)(C)(i) for attempting to acquire an immigration benefit through fraud and under 8 U.S.C. 1182(a)(7)(A)(i)(I) for lacking a valid entry document. Pet. App. B6, C1-C2. DHS filed the notices in immigration court on November 1, 2003. *Id.* at D2-D3.[3]

During the course of removal proceedings, petitioners requested that the immigration judge (IJ) issue subpoenas to Berishaj and Shandorf, among others, to appear and testify. Pet. App. D5-D6. The IJ denied their requests because petitioners failed to comply with

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[3] Pursuant to 8 C.F.R. 1003.14(a), removal proceedings are commenced on the date of filing a Notice to Appear in immigration court. Accordingly, it appears that DHS commenced petitioners' removal proceedings exactly five years and one month after the date of their adjustment of status (or six years and one month from the retroactive date of adjustment).

8 C.F.R. 1003.35(b)(2)'s requirement that applicants establish their diligence in attempting to produce the requested witnesses. Pet. App. D6.

After a hearing on the merits, the IJ found by clear and convincing evidence that petitioners had been granted asylum through fraud and had no valid entry documents when their status was adjusted. Pet. App. D26-D39. He thus ordered them removed. *Id.* at D40. The IJ relied on Berishaj's testimony from Shandorf's trial stating that petitioners had received asylum due to Shandorf's improper interference. *Id.* at D27-D29. The IJ also relied on petitioners' own "implausible" testimony at the hearing—including the story that they had coincidentally run into Berishaj at a restaurant, where he offered to fill out the asylum applications on the spot and then disappeared—as well as inconsistencies with the wife's sister's testimony. *Id.* at D30-D31. The IJ further found that the government had proven that petitioners' "claimed New York residence was a misrepresentation provided to ensure that [petitioners] would be able to benefit from Berishaj's relationship with John Shandorf." *Id.* at D27.

4. The Board of Immigration Appeals (Board) adopted and affirmed the IJ's decision and dismissed the appeal. Pet. App. C1-C8. The Board first rejected petitioners' argument that the removal proceedings were barred because their asylee status had not been terminated and their lawful permanent resident status had not been rescinded within 8 U.S.C. 1256(a)'s five-year period. Pet. App. C2, C4 (citing *In re Smriko*, 23 I. & N. Dec. 836 (B.I.A. 2005), and *In re Koloamatangi*, 23 I. & N. Dec. 548, 550 (B.I.A. 2003)). The Board then found no adequate basis to disturb the finding that petitioners had obtained their asylee status through fraud and that

DHS had proven by "clear and convincing evidence" that petitioners were removable. *Id.* at C4-C6. The Board further rejected petitioners' assertion that they were denied a "full and fair hearing" because the IJ had denied their subpoena requests, observing that petitioners did not refute their failure to comply with the requirements for obtaining a subpoena under 8 C.F.R. 1003.35(b)(2). Pet. App. C7.

5. The court of appeals denied the petition for review. Pet. App. B1-B30.

As a threshold matter, the court held that the five-year imitations period on rescission proceedings under 8 U.S.C. 1256(a) does not apply to removal proceedings and that DHS therefore was not time-barred from initiating removal proceedings. Pet. App. B12-B18. The court explicitly rejected the Third Circuit's contrary view and embraced the conclusion reached by the other three circuits to have decided the question. *Id.* at B14. The court held that Section 1256(a), "[b]y its own terms," places a time limitation only on rescission and does not apply to removal proceedings—a conclusion supported by the 1996 amendment adding Section 1256(a)'s last sentence, which expressly disclaims a requirement to rescind status prior to commencement of removal proceedings. *Id.* at B15. To the extent any ambiguity remained, the court deferred to the agency's reasonable interpretation that Section 1256(a) "only limits the Attorney General's authority to rescind an adjustment of status" and thus "the lapse of more than five years since applicant's adjustment does not bar an exclusion proceeding based upon the alleged fraudulent procurement of an entry visa prior to his adjustment of status." *Id.* at B15-B16 (quoting *In re S-*, 9 I. & N. Dec. 548, 557 (Att'y Gen. 1962)). On a related issue, the court

agreed with the Board that petitioners were not immune from removal simply because their asylee status had not been separately revoked. *Id.* at B18-B19.

On the merits of the fraud determination, the court of appeals held that the record supported the agency's determination that petitioners fraudulently obtained their asylee status. Pet. App. B19-B25. The court concluded that the transcript of Berishaj's testimony from Shandorf's criminal trial and petitioners' own testimony before the immigration judge were each sufficient to support the finding of removability based on fraud. *Id.* at B20-B24. The court reiterated the IJ's explanation that "[w]hile the evidence may be insufficient to show [petitioners] bribed the asylum officer, the Government need only show fraud or willful misrepresentation, not bribery." *Id.* at B21 (quoting *id.* at D37-D38) (first brackets in original).

The court also rejected petitioners' claims that the IJ abused his discretion and violated due process by denying their subpoena requests. Pet. App. B25-B27. The court relied on petitioners' failure to comply with 8 C.F.R. 1003.35(b)(2)'s requirement that a subpoena request show that "a diligent effort, without success" had been made to produce the witnesses. Pet. App. B26. The court also noted that the Confrontation Clause of the Sixth Amendment does not apply to removal proceedings. *Id.* at B27.

In an opinion concurring in part and concurring in the judgment, Judge Moore stated that it was unnecessary to address the circuit split on Section 1256(a)'s limitations period because the disagreement in those cases centers on an issue absent here. Pet. App. B28-B30. Judge Moore observed that removability in those cases was based on fraud or error in the adjustment-of-status

process itself, whereas in this case removal is based on fraud in the "entirely separate and distinct" asylum process preceding the adjustment. *Id.* at B29-B30.

ARGUMENT

1. The court of appeals' decision on the applicability of 8 U.S.C. 1256(a)'s five-year limitations period to removal proceedings is correct and consistent with the considered interpretation of that provision by the Attorney General for almost 50 years. That decision (at most) only makes a limited disagreement among the courts of appeals more lopsided in the government's favor. As the separate opinion observes, the facts of this case do not provide an appropriate vehicle for resolving that limited conflict. The Court recently denied a petition for certiorari in a case raising the same issue, and a different result is not warranted here.

a. The court of appeals' decision is correct. The court properly relied on the plain text of 8 U.S.C. 1256(a) to conclude that the five-year time limit on rescission of adjustment of status does not apply to removal proceedings brought on the basis of fraud in the preceding grant of asylum. As the court observed, "[b]y its own terms, [Section] 1256 places a time bar only on the Government's attempt to rescind the status of a lawful permanent resident, and does not apply to removal proceedings." Pet. App. B15; see, *e.g.*, *Kim* v. *Holder*, 560 F.3d 833, 837 (8th Cir.), cert. denied, 130 S. Ct. 393 (2009); *Asika* v. *Ashcroft*, 362 F.3d 264, 269 (4th Cir. 2004), cert. denied, 543 U.S. 1049 (2005). The court further noted that the 1996 amendments to Section 1256(a)—adding in part that "[n]othing in this subsection shall require the Attorney General to rescind the alien's status prior to commencement of procedures to

remove the alien under section 1229a of this title"—"explicitly allows the Government to initiate removal proceedings * * * without first rescinding the alien's permanent resident status." Pet. App. B15; see *Garcia* v. *Attorney Gen.*, 553 F.3d 724, 729-731 (3d Cir. 2009) (Fuentes, J., dissenting).

The textual distinction between rescission and removal proceedings for purposes of Section 1256(a)'s limitations period is consistent with the evolution of the broader statutory scheme. Before 1952, the relevant statutes prescribed a five-year limitations period within which the Government could initiate deportation proceedings from the time that an alien became deportable. See *Oloteo* v. *INS*, 643 F.2d 679, 682-683 & n.7 (9th Cir. 1981). When Congress enacted the INA in 1952, Congress eliminated any limitations period from the provisions governing deportation proceedings. *Ibid.*; see INA, 8 U.S.C. 1252 (1952). Congress also, however, separately provided for the first time in Section 1256(a) for actions by the Attorney General to rescind an erroneous grant of adjustment of status to an alien, subject to the five-year limitation. *Oloteo*, 643 F.2d at 682-683; see INA § 246(a), 66 Stat. 217. Congress's categorical elimination of a limitations period for deportation proceedings in the INA, while engrafting a more limited one on the newly created rescission procedure, reinforces the court of appeals' reading.

The court of appeals' interpretation avoids strange consequences as well. Petitioner's reading would create the anomalous result that aliens who initially entered the country as nonimmigrants and subsequently adjusted their status while in the United States would be immune from deportation after the lapse of the five-year period, whereas aliens who initially entered the

country as lawful permanent residents would be subject to deportation based on a defect in the initial grant without any time limitation. See *Asika*, 362 F.3d at 271; *In re S-*, 9 I. & N. Dec. 548, 553-554 (Att'y Gen. 1962).

b. The court of appeals was also correct in concluding that, to the extent that there is any ambiguity as to the meaning of 8 U.S.C. 1256(a), the Attorney General's interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. B15. Almost 50 years ago, in 1962, the Attorney General determined that the five- year limitations period for rescission actions did not apply to exclusion or deportation proceedings. See *In re S-*, 9 I. & N. Dec. at 551-557. Since *In re S-*, the Attorney General and the Board have adhered to the same considered view. See, *e.g.*, *In re Belenzo*, 17 I. & N. Dec. 374 (Att'y Gen. 1981); Pet. App. C4. The 1996 amendment, by making clear that rescission is not a prerequisite to removal, confirms and strengthens the Attorney General's interpretation.

In construing Section 1256(a), the Attorney General's 1962 decision acknowledged that the five-year limitations period for rescission actions "may be of little practical value" to many aliens because, even if an alien was insulated from rescission of status after the five-year period, "the same conduct nevertheless [could] be utilized independently as a ground for his deportation or exclusion." *In re S-*, 9 I. & N. Dec. at 555. At the same time, however, the Attorney General recognized the distinction between rescission and removal proceedings and the reason why Congress would have applied the limitations period to the former but the not latter. As the Attorney General explained, the "rescission procedure apparently resulted from congressional recognition that a means more informal and expeditious than depor-

tation was needed to correct mistakes made in granting permanent residence to nonimmigrant aliens through adjustment of status." *Id.* at 555 n.8; see *Asika*, 362 F.3d at 270 ("Under the Act, rescission proceedings are subject to few, if any, procedural protections, *see* 8 U.S.C. § 1256; deportation proceedings, in contrast, are subject to extensive procedural regulations set forth in 8 U.S.C. § 1229a.").

Accordingly, the Attorney General correctly concluded that "the significance which Congress attached to the five-year limitation was that it cut off the availability of a procedure which, although to all intents and purposes would establish deportability, *permitted* the Attorney General to act more informally and expeditiously than he could in a deportation proceeding." *In re S-*, 9 I. & N. Dec. at 555 n.8; see *Asika*, 362 F.2d at 270 ("[S]ection [1256(a)]'s five-year limitation on rescission—even if interpreted to apply only to rescission proceedings—provides an important safeguard to aliens * * * who have been in the country for more than five years after their status has been erroneously adjusted, by forcing the Attorney General to establish their deportability through the more rigorous procedures of removal * * * rather than the less procedurally-onerous process of rescission."). Congress's decision to place a five-year limitation on the less formal rescission procedure but not on more protective removal proceedings is thus a reasonable accommodation between protecting an adjusted alien's settled expectations and preventing circumvention of the immigration laws (which may not be discovered, as here, until much later).[4]

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[4] As the Attorney General noted, "while Congress may have *permitted* the Attorney General to make use of more informal procedures

Petitioner contends (Pet. 12-13) that *Chevron* deference is unwarranted because the question presented involves interpretation of a limitations provision and resolution of such questions does not require agency expertise. But Section 1256(a) does not pertain to the time period within which an alien aggrieved by agency action can seek *judicial* review; it instead relates to the time period within which the *agency* itself can carry out its responsibilities under the INA by conducting removal proceedings. See *Asika*, 362 F.2d at 271 n.8 ("The Attorney General's answer to the question presented * * * does not depend on a straightforward interpretation and application of a statute of limitations; rather, it requires the Attorney General to consider whether a five-year statute of limitations would be consistent with the statutory and regulatory framework for deportation, when applied to a few, but not all, of the cases within that framework."). The interpretation of the limitations period in Section 1256(a) thus directly affects the agency's execution of the INA—an issue well within the agency's expertise.

Congress has committed the adjudication of such matters under the INA to the Attorney General (authority that has been transferred in part to the Secretary of DHS), and *Chevron* deference therefore applies. See 8

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in rescission, in practice under the governing regulation there is little difference between the safeguards afforded an alien in deportation and that afforded him in rescission." *In re S-*, 9 I. & N. Dec. at 556 n.8 (citing 8 C.F.R. 246.12(a) and (b) (1962)); see generally 8 C.F.R. Pt. 246. "That the INS has chosen *in its discretion* to provide additional procedural protections to aliens in rescission proceedings reveals nothing about whether Congress relied on the *statutory* disparity in procedures for rescission and removal in enacting section 246(a)." *Asika*, 362 F.3d at 270 n.7.

U.S.C. 1103(a)(1) (2000) ("The Attorney General shall be charged with the administration and enforcement" of the INA, and "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."), amended by Homeland Security Act Amendments of 2003, Pub. L. No. 108-7, § 105(a)(1), 117 Stat. 531 (substituting "Secretary of Homeland Security" for Attorney General in first clause); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to [the INA]."). The Attorney General's reasonable and long-standing interpretation of 8 U.S.C. 1256(a) falls well within the bounds of *Chevron* and thus controls here. Cf. *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95-96 (2006) ("[W]hen the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous.").

c. The court of appeals' decision in this case reinforces the majority view against the Third Circuit's outlying interpretation of 8 U.S.C. 1256(a). The Sixth Circuit joined the Fourth, Eighth, and Ninth Circuits in holding that although Section 1256(a) precludes the government from rescinding an alien's permanent resident status more than five years after the date of the alien's adjustment, it does not bar the government from initiating removal proceedings based on the unlawfulness of that adjustment (or, as here, based on fraud in the preceding grant of asylum). See Pet. App. B14; *Kim*, 560 F.3d at 837-838; *Asika*, 362 F.3d at 267-271; *Biggs* v. *INS*, 55 F.3d 1398, 1401 & n.3 (9th Cir. 1995). Only the Third Circuit has held that Section 1256(a)'s five-year limitation on rescission actions applies to removal proceedings. See *Garcia*, 553 F.3d at 727-728; *Bamidele* v. *INS*, 99 F.3d 557, 562-565 (3d Cir. 1996); but see *De*

Guzman v. *Attorney Gen.*, 263 Fed. Appx. 222, 225-226 (3d Cir. 2008) (allowing removal proceedings and distinguishing *Bamidele* on the ground that, unlike in that case, the government did not become aware of the alien's ineligibility for adjustment of status until after the five-year period had lapsed).

Given that the Third Circuit stands alone, both the importance and the intractability of the circuit conflict may depend on whether any other courts of appeals align themselves with the Third Circuit. This Court's intervention would thus be premature. That is especially true in light of the 1996 amendment to Section 1256(a), on which the court below relied in part. Further percolation is appropriate to allow other courts of appeals to adjudicate the issue under the current version of the statute. Indeed, the Court recently denied the petition for a writ of certiorari in *Kim*, *supra*, and there is no reason for a different result here.

In addition, as Judge Moore's separate opinion points out (Pet. App. B28-B30), this case would be a particularly poor vehicle to address the limited circuit conflict. In the prior circuit decisions involving the applicability of Section 1256(a)'s five-year limitation to removal proceedings, removability was based on fraud or error in the adjustment-of-status process itself. *Id.* at B28-B29 (citing cases). By contrast, petitioners' removability in this case is based on fraud in obtaining asylum—a step antecedent to the adjustment of their status to that of lawful permanent resident. The applicability of Section 1256(a)'s time limit to a challenge via removal proceedings to the validity of an alien's adjustment of status is a question distinct from its applicability to such a challenge to an alien's initial grant of asylum. *Id.* at B29-B30; see *Arellano-Garcia* v. *Gonzales*, 429 F.3d 1183,

1186 (8th Cir. 2005) (declining to comment on circuit conflict involving Section 1256(a) because removal proceedings in that case were "based on [petitioner's] prior conviction, not on the erroneous grant of permanent residency status"). The Third Circuit itself has endorsed that distinction, so the result in this case presumably would be no different even under its interpretation of Section 1256(a). See *Garcia*, 553 F.3d at 728 (acknowledging Section 1256(a)'s "narrow" time bar as operating "only where deportation is based on an attack on the adjustment itself") (citations omitted); *Bamidele*, 99 F.3d at 564 ("If deportation is predicated on something outside the adjustment, there is no bar.") (citation omitted). This case thus does not directly implicate the existing conflict.

2. Petitioners challenge the IJ's denial of their subpoena requests and contend that the record evidence was insufficient to establish fraud in the grant of asylum. Pet. 17-23. Petitioners fail to identify any conflict between the decision of the court of appeals and any decision of this Court or another court of appeals. In any event, the court of appeals' decision is correct, and these factbound claims do not warrant further review.

Petitioners allege a due process violation by invoking various evidentiary principles applicable in criminal proceedings. Pet. 17-20. But petitioners do not address the governing immigration regulation, 8 C.F.R. 1003.35(b)(2), which requires a subpoena applicant in immigration court "to show affirmatively that he or she has made diligent effort, without success, to produce" the witnesses sought. As the court of appeals determined (Pet. App. B25-B26), petitioners failed to comply with that requirement. Petitioners nowhere dispute that determination—consistent with that of the IJ (*id.* at D6)

and the Board (*id.* at C7)—nor do they challenge the validity of the regulation itself. There is thus no basis for this Court to intervene.

Moreover, even excluding Berishaj's testimony at Shandorf's criminal trial, sufficient record evidence supports the IJ's conclusion that petitioners fraudulently obtained their asylee status. As the court of appeals reiterated, "[w]hile the evidence may be insufficient to show [petitioners] bribed the asylum officer, the Government need only show fraud or willful misrepresentation, not bribery." Pet. App. B21 (quoting *id.* at D37-D38) (first brackets in original). Petitioners' inconsistent and implausible testimony regarding their asylum applications, in addition to the documentary evidence, at least establishes their fraudulent conduct, if not more. See *id.* at B21-B22 ("[T]he IJ properly found that 'the Government also established [petitioners'] fraud through [petitioners'] own testimony.'") (quoting *id.* at D30).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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